Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

LOON MOUNTAIN RECREATION CORPORATION,

Petitioner,

vs.

ROLAND C. DUBOIS and RESTORE: THE NORTH WOODS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does withdrawal and return of water to the same body of water of the United States without addition of any pollutants constitute a point source discharge requiring a permit under the Clean Water Act?

2. Does transfer of water without addition of any pollutants from one water of the United States to another constitute a point source discharge requiring a permit under the Clean Water Act?

3. Does the National Environmental Policy Act require review of additional mitigation alternatives when the agency has determined that the planned mitigation completely ameliorates any consequential environmental harm?

4. When all of the components of a selected alternative under the National Environmental Policy Act have been fully analyzed and considered, does the law require separate consideration of such alternative *sub hoc nomine*?

LIST OF INTERESTED PARTIES

Petitioner:

Loon Mountain Recreation Corporation

(No parents or subsidiaries)

Respondents:

Roland C. Dubois

Restore: The North Woods

Other Parties:

The National Forest Service of the United States Department of Agriculture

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OPINIONS BELOW

The opinion of the court below, *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), is annexed hereto as Appendix A. The modification ordered after Petitions for Rehearing is annexed hereto as Appendix B. The opinion of the United States District Court for the District of New Hampshire, *Dubois v. United States Department of Agriculture*, Civil No. 95-50-B (D.N.H. November 2, 1995), is annexed hereto as Appendix C.

STATUTES INVOLVED

Excerpts of the relevant statutes are annexed hereto as Appendix D.

REGULATIONS INVOLVED

Excerpts of the relevant regulations are annexed hereto as Appendix E.

STATEMENT OF JURISDICTION

The judgment of the Appeals Court was issued on December 19, 1996, and requests by the parties for rehearing were granted in part and denied in part on February 13, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The underlying District Court case arose under the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.*; the Administrative Procedures Act, 5 U.S.C. § 501 *et seq.*; and the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

STATEMENT OF THE CASE

A. Procedural History.

Roland Dubois initiated this matter in June, 1994, by filing a complaint against the Forest Service, an agency within the United States Department of Agriculture (the "Forest Service"), in the District Court for the District of Columbia. He alleged in his original complaint that the Forest Service violated the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA") by issuing its Record of Decision ("ROD") granting Loon Mountain Recreation Corporation's ("Loon") application to expand its ski operations in the White Mountain National Forest (the "National Forest") in Lincoln, New Hampshire. Dubois also claimed that the expanded operations would violate state antidegradation standards and the federal Clean Water Act ("CWA"). The First Amended Complaint and Application for Injunctive Relief named the same government defendants, but contained no CWA claims.

The proceeding was transferred to the United States District Court for the District of New Hampshire in February, 1995. Dubois then filed a Second Amended Complaint and Application for Injunctive Relief, claiming the Forest Service violated the CWA by authorizing Loon's snowmaking operations. He asserted no claim against Loon.

In March, 1995, RESTORE: The North Woods ("RESTORE") intervened as a plaintiff asserting the same claims. Shortly thereafter, Loon intervened. The parties filed cross motions for summary judgment. The District Court disposed of the cross motions for summary judgment in its Memorandum and Order of November 2, 1995. Appendix C.[1]

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1. Following the hearing on the motions for summary judgment, Dubois (Cont'd)

In doing so the District Court granted to the Forest Service summary judgment on DuBois and Restore's NEPA, CWA, and state water quality standard claims.

On December 19, 1996, the United States Court of Appeals for the First Circuit partially reversed the District Court's dismissal, holding that a Supplemental Environmental Impact Statement under NEPA was required for the development alternative chosen, and that the Forest Service was required to obtain a permit under the CWA for certain discharges from Loon's snowmaking system into Loon Pond. Appendix A.

Both Loon and the Forest Service filed timely motions for rehearing. Dubois also filed a conditional request for rehearing. On February 13, 1997, the Court of Appeals modified its December 19 decision to state that Loon, not the Forest Service, was required to obtain the permit in question, but otherwise denied the requests for a rehearing. Appendix B. The Court of Appeals subsequently denied motions by Loon to stay issuance of its mandate to the District Court, and to recall the issuance of that mandate, while Loon prepared its Petition for a Writ of Certiorari.

(Cont'd)
filed a supplemental brief on water quality issues. On June 24, 1995, he also filed a motion to amend, seeking leave to pursue a third amended complaint. The proposed complaint, filed only thirty days after Loon's intervention, named Loon as a defendant for the first time. It claimed that Loon's snowmaking operations violate the CWA. The District Court did not rule on Dubois' motion to amend. Dubois filed his Notice of Appeal on December 28, 1995, and on the same day moved the District Court for a ruling on the motion to amend. The District Court issued an order allowing Dubois' Motion to Amend on January 22, 1996, but not until after the appeal was docketed and the record was certified.

B. Statement of Facts.

Loon, a New Hampshire corporation, operates the Loon Mountain Ski Area in Lincoln, New Hampshire. Loon began its downhill ski operation over thirty years ago. It has grown and developed into a major destination resort, winning recognition as New Hampshire's most popular ski resort, and contributing significantly to the economic well-being of its host town and the State of New Hampshire.

Since part of the ski area is located in the National Forest, Loon has been operating under a permit issued by the Forest Service in 1976 pursuant to the National Forest Ski Area Permit Act, 16 U.S.C. § 497(b). The permit authorized development of the ski area to its present configuration, with some additional expansion of facilities. It also authorized construction in 1978 of Loon's current snowmaking operation, which involves pumping water from the East Branch of the Pemigewasset River (the "East Branch"), from Boyle Brook, and from Loon Pond and transferring water from the East Branch to Loon Pond.[2]

To address conditions of overcrowding and congestion, and to respond to changes in ski area technology and market demand, Loon applied to the Forest Service in November, 1986, for an amendment to its permit allowing for a phased expansion of the ski area. The plan contemplated improvements in existing areas to more safely accommodate skiers, replacement of two lifts with a high speed "quad" lift, installation of new trails serviced by the quad, and the upgrade of snowmaking facilities with expanded coverage. It also contemplated expansion of operations onto additional National Forest land previously designated for that purpose.

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2. Such transfers are made in order to minimize the net drawdown from Loon Pond and to mitigate the impact of water withdrawal on Loon Pond.

Loon's plan was consistent with and pursuant to the White Mountain National Forest Land and Resource Management Plan ("Forest Plan"), which has been a key part of the winter recreation history of New England. The Forest Plan encourages further development of recreational opportunities through private enterprise, and recognizes the importance of downhill skiing as a vital component of public outdoor recreation in New Hampshire. The Forest Plan expressly contemplated expansion of existing ski areas onto adjacent National Forest land set aside and reserved for such purpose.

Over the next seven years, the proposed expansion was examined extensively in the NEPA process. In addition to the Draft Environmental Impact Statement ("EIS") completed in 1989, the Forest Service prepared a Supplemental EIS (1989), a Revised Draft EIS (1991), and a Final EIS (1992). Public comments were accepted and a formal advisory committee was convened. At each stage, the Forest Service examined each aspect of the alternatives before it on an aspect-by-aspect basis. Thus, for example, the water use implications of *each* alternative then before the Forest Service were analyzed, compared, and contrasted. The Forest Service also examined all mitigation alternatives for each alternative up to the point at which all material environmental impacts of such alternative were fully mitigated or avoided.

The Forest Service issued its ROD on March 1, 1993. It approved a revised version of Loon's expansion plan based on a combination of aspects of previously examined alternatives and granted a new forty-year permit (the "Permit") to replace the one scheduled to expire in 2006. Subject to Forest Service approval of plans and extensive mitigation measures, the Permit allowed Loon to proceed with the so-called Sixth Alternative ("Alternative 6"), representing a consolidation and refinement of elements of five other alternatives and a significantly reduced

level of development, involving only one-half of the National Forest land previously allocated for potential expansion.

The Permit allowed some expansion of Loon's snowmaking operation to encompass the additional trails but left materially unchanged the system for pumping and transferring water. Snowmaking on existing ski terrain was to continue using water from the East Branch, Boyle Brook, and Loon Pond.[3] Extensive testing and monitoring were to continue, and stringent limitations to protect the environment were imposed. Under both the former and new permits Loon's snowmaking and water transfer facilities were designed to ensure that only Class A quality water from the East Branch enters Loon Pond, a state-designated Class A body of water. Water drawn from the river is tested daily by Loon to check its quality.

In the snowmaking process, water is pumped through the main line to a mid-slope valve station and to an upper mountain compressor house; it is distributed from these locations to various parts of the mountain for snowmaking, or, from the compressor house, to recharge Loon Pond. Water also is drawn from Loon Pond for upper mountain snowmaking. A valve on each hydrant in the snowmaking system controls the flow of

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3. Since 1974, Loon facilities also have been an integral part of Lincoln's public water delivery system. Loon and the Town have had an agreement, approved by the Forest Service, allowing Loon to use Loon Pond water for snowmaking; Loon personnel monitor the level of Loon Pond and operate equipment there to ensure sufficient flow to and water resources for the Town. Following an unusually dry year in 1988-89 when the Pond was drawn down 10.5 feet, Loon and the Town revised their agreement, allowing Loon to install a new siphon at the Pond to accommodate a drawdown of 15 feet. In 1990, the New Hampshire legislature encouraged further development by expressly authorizing Loon to take water for snowmaking from the East Branch and from Loon Pond, subject to federal, state, and town permits and agreements. N.H. Session Laws, Chapter 239:2 (1990).

water to the nozzle of a snow gun. Compressed air is delivered to hydrants through a system wholly separate from the water distribution system, and air is mixed with water only at the nozzle to produce snow. All of the water that is mixed with air at the nozzle is used for snowmaking and is discharged from the nozzle. When a hydrant is closed, the residual water that has been mixed with air is forced out through the nozzle and a check valve prevents residual water from returning to the snowmaking system, causing all remaining air-mixed water in the hydrant stem to drain onto the ground. The non-air-mixed water remaining in the water distribution pipes, however, is drained back to its source. As evidence before the Forest Service and the District Court reflects,[4] none of the water that drains back or that is pumped through the system and directed into Loon Pond is mixed with air or otherwise subjected or exposed to intervening use, change, additives, or contaminants of any kind.[5]

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4. The First Circuit mentions the possibility of oil and grease being present in the pipes, but the opinion did not rely on that hypothetical possibility. Appendix A, Op. at 47a n.29. No oil and grease were found by the Forest Service or the District Court.

5. The State of New Hampshire was satisfied that the expanded operations, as subjected to complex mitigation measures, would not adversely affect the water quality and beneficial use of Loon Pond, and thus would not violate state antidegradation rules. On December 22, 1993, the state issued a Section 401 Water Quality Certificate for these expanded operations, under its EPA-approved certification process.

REASONS FOR GRANTING THE WRIT

I.

A CWA PERMIT IS NOT REQUIRED FOR WITHDRAWAL AND RETURN OF WATER FROM A SINGLE WATER BODY, OR TRANSFER OF WATER BETWEEN TWO BODIES OF WATER THAT CONSTITUTE "WATERS OF THE UNITED STATES," WHEN THE WITHDRAWAL AND RETURN DOES NOT INTRODUCE ANY POLLUTANTS.

The instant case is one of several causing a split among the circuit courts regarding whether a CWA — also called a National Pollutant Discharge Elimination System ("NPDES") — permit is required (1) to withdraw and return water to the same water body without addition of any pollutants; or (2) to transfer water without addition of any pollutants from one body of water of the United States to another via a point source. The Court of Appeals for the First Circuit held that, because "the East Branch and Loon Pond are not the same body of water" and because "the transfer of water or its contents from the East Branch to Loon Pond would not occur naturally," a permit was required. Appendix A, Op. at 48a. It further stated that, even if the water were returned to the *same* body from which it was withdrawn, Appendix A, Op. at 50a, the discharge of water from the snowmaking system into Loon Pond required a permit under the CWA. This decision is inconsistent with the Environmental Protection Agency's (the "EPA") historical administrative practice and determination that NPDES permits are not needed in such instances, as well as some — but not all — case law holding that the *addition* of pollutants is the critical determinant of whether an NPDES permit is required for that process. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 583-90 (6th Cir. 1988); *National Wildlife Federation v.*

Gorsuch, 693 F.2d 156, 171-75 (D.C. Cir. 1982); *Bettis v. Town of Ontario*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992). Accordingly, Supreme Court review is essential not only to coordinate law among the circuits but also to determine core issues under the CWA that affect or could affect, *inter alia*, every ski facility, municipal water supply, and hydroelectric plant in the United States.

The CWA governs any discharge of pollutants into navigable waters of the United States. 33 U.S.C. §§ 1311 and 1362(12). "Navigable waters" for purposes of NPDES are "the waters of the United States." 33 U.S.C. § 1362(7). It is unclear whether Congress intended to regulate waters from one body designated "waters of the United States" transferred back to that same body or to another. Appendix C, D. Ct. Op. at 70a. *See* Legislative History of the CWA, 33 U.S.C. § 1362(7) at H.R. Rep. No. 92-911, 92d Cong. 2d Sess. 131 (1972); H.R. Rep. No. 92-1465, 92d Cong., 2d Sess. 144 (1972); 118 Cong. Rec. 9124-25 (daily ed. Oct. 4, 1972). According to the congressional statement of purpose, however, the CWA was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters, 33 U.S.C. § 1251(a), thereby indicating a general purpose to protect such waters from man-made pollution, not from each other.

A. Circuit Courts Interpret Differently Whether the Withdrawal of Water From and Return of Water to a Single Water Body Without Adding Pollutants Triggers the CWA's NPDES Requirements.

In the case below, the District Court decision did not focus on the withdrawal and return of water to the same water body. This critical issue first arose in the First Circuit. Even this decision, however, failed to fully analyze the issue and arrived at its conclusion after circuitous reasoning. The First Circuit's

decision turns on the idea that once water leaves the "domain of nature" it becomes a discharge if later returned to its source, even if returned unchanged. Whether any ***pollutants*** were added to the water or whether the water was affected was immaterial according to the court's decision.

This issue is a matter of controversy among the appellate courts, with a split of three or four circuits on either side of the issue. For example, in *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the dam holding back waters of a certain river in a reservoir was deemed a "point source" under the CWA. The Court of Appeals for the District of Columbia decided, however, that certain dam-induced water quality changes did *not* constitute "discharges of pollutants" under the CWA, and therefore dam operators were not required to obtain NPDES permits. The court deferred to the EPA's view that water quality effects[6] evident in reservoirs and river water downstream of dams are not pollutants as defined in the CWA. The *Gorsuch* Court affirmed the EPA's interpretation of the statute, which it described as "a natural reading, both on its face and in light of the legislative history." *Id.* at 174. The court reasoned that, had Congress wanted to apply the NPDES system to *all* pollution released, it would not have kept the restriction to "added pollutants." *Id.* at 176.

In short, under *Gorsuch*, the NPDES permitting process is implicated only if the point source *adds* the pollutant into navigable water from the "outside world." *Id.* at 165, 174-75. While the facility in some circumstances can be a point source, "the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one

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6. Such effects include low dissolved oxygen, concentration of dissolved minerals and nutrients, water temperature changes, and sediment release.

body of navigable water (the reservoir) to another (the downstream river)." *Id.* at 175. Under the *Gorsuch* analysis, if no pollutants are added by Loon's pumping system, return of water to the sources would raise no permit issue.

The *Gorsuch* decision essentially incorporated the Fourth Circuit's reasoning in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976). That court held that "[t]he Act prohibits only the *addition* of any pollutant to navigable waters from a point source. Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass." *Appalachian Power*, 545 F.2d at 1377 (emphasis added). *See also Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297 (8th Cir. 1982). A contrary rule would preclude the EPA from defining pollutant to exclude beneficial water quality changes, a limitation on EPA's considerable authority and discretion under the CWA. *Gorsuch*, 693 F.2d at 173, 182; *see Consumers Power*, 862 F.2d at 585.

The Sixth Circuit came to similar conclusions in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988). It held that the Ludington hydroelectric facility was not required to obtain an NPDES permit to continue its practice of using water to generate power and subsequently dump the water and entrained fish into Lake Michigan. At the Ludington facility six pumps move Lake Michigan water through hundreds of feet of pipe, through large penstocks, into a manmade reservoir. To generate power, water released from the reservoir passes through turbines and then is released back into Lake Michigan. During normal operations, large quantities of fish and other aquatic organisms are drawn into the system ("entrained") and destroyed. The remains, along with fish and organisms that survive, are dumped back into the Lake. There was no doubt in *Consumers Power* that entrains constituted

"biological materials" and were thus "pollutants" as defined in the Act. Nevertheless, the Court held that *"movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States."* *Consumers Power*, 862 F.2d at 580-81 (emphasis added).[7]

The *Consumers Power* court affirmed the EPA's historical position that there is no "addition" unless a source "'physically introduces a pollutant into water from the outside world." *Id.* at 584. Since the entrained fish originated in the Lake, they did not enter the Lake from the "outside world," *Id.* at 581, 584-85, and movement of the polluting biological material into a different body of water through a massive pumping and turbine system does not trigger NPDES. The dead fish, indeed, changed the quality of the receiving water, just as storage dams were found in *Gorsuch* to transform the essential character of the water for its biological inhabitants. *Consumers Power*, 862 F.2d at 585. Nevertheless, since the facility did not create the fish which became entrained in the generating process, it caused no "addition" of a pollutant. *Id.* at 585-86.

On the other hand, the First Circuit, in its opinion in this case, joins at least three other circuits in finding that the mere withdrawal and replacement of that very same water *requires* an NPDES permit. The court held that withdrawal and replacements were no different than transfers to a different body of water and also required an NPDES permit. Appendix A, Op. at 50a. By doing so this Circuit joins the Fifth, Ninth and Eleventh Circuits in holding that NPDES permits are required for withdrawals and replacements, even without an addition to the water or ecosystem. *See Rybachek v. United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) ("[E]ven if the material

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7. Turbine generating waters are distinguished from operational wastewater which contain pollutants from outside the power generating system. Discharge of the latter is subject to NPDES. *Id.* at 582.

discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act."); *United States v. Florida*, 772 F.2d 1501, 1506 (11th Cir. 1985) (Following *Avoyelles* and the "broad objectives" of the CWA, the Eleventh Circuit held that the "word 'addition' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'."); *Avoyelles v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). *See also United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 204 (D. Ore. 1990) (holding that an NPDES permit was necessary if the defendant redeposited certain indigenous materials into the river).

B. Circuit Courts Interpret Differently Whether the Transfer of United States Waters Is a Discharge of Pollutants If No Pollutants Are Introduced During the Transfer Process.

Similar issues are implicated when courts examine the slightly different issue of whether the CWA requirements are triggered when water is transferred from one body of water of the United States to another. This question is closely linked to the first in that (i) the same elements of the CWA apply; (ii) no pollutants are added during the transfer; and (iii) courts, within each circuit, use the same means of analysis. As a result, on this issue as well there are significant discrepancies in the law between circuits.

In the instant case, the United States District Court for the District of New Hampshire upheld the EPA's position as stated before it by the United States Department of Justice that a NPDES permit would *not* be required to mix waters of the United States, regardless of their relative water quality, because there was no intervening use of the water causing it to lose its status as waters of the United States.[8] The District Court determined

8. This is not to say that different bodies and portions of waters of the (Cont'd)

that, since Loon added nothing to the water in the transfer process, the mere transfer of the water from one body of water of the United States to another did not subject Loon to CWA permitting requirements. Appendix C, D. Ct. Op. at 75a.

The First Circuit, however, inserted a heretofore unknown distinction into its analysis under the CWA. Reasoning that since the waters of the United States *from* which the water was drawn were "distinct" from the water *to* which it was transferred, the proposed transfer constitutes an "addition" and requires an NPDES permit. Appendix A, Op. at 53a. This analysis is consistent with a Second Circuit holding that a railroad culvert between the two bodies of water of the United States through which water passed was a point source and thus the discharger was subject to the CWA. *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991). Thus, it found a city liable for unpermitted discharges. *See also Del-AWARE Unltd., Inc. v. Pennsylvania DER*, 508 A.2d 348 (Pa. 1986).

As with the withdrawal and replacement of water, certain courts have held that the transfer of water from one body of water of the United States to another *does not* require an NPDES permit. A District Court in New York, for example, held that "water itself, . . . is not a pollutant. Simply moving water from once place to another . . . does not constitute the discharge of a pollutant under the Act." *Bettis v. Town of Ontario*, 800 F. Supp. 1113, 1119 (W.D.N.Y. 1992) (citation omitted).

(Cont'd)

United States are completely unprotected. Such water quality issues are regulated by state water quality antidegradation laws and regulations for which, as here, an NPDES permit is not required. *See also Gorsuch*, 693 F.2d at 171-73. Congress "explicitly chose not to completely federalize water pollution control, but instead directed the states to establish their own pollution control programs under EPA oversight." *Id.* at 178.

C. *This Split at the Circuit Level Results in Substantial Costs to Ski Areas, Municipalities, Power Plants, and Water Suppliers Nationwide and Subjects Those Same Entities to Unnecessary Inequities at the Federal Level.*

It is of considerable national importance that this Court review the application and interpretation of the CWA in the situations discussed above. First, as enumerated *supra*, the Courts of Appeals have set diverging precedents with no majority rule or reconcilation in sight. As such, at present, a ski resort or any other entity replacing or transferring water would *not* be subject to the Clean Water Act if located in some parts of the United States, but that same activity in New Hampshire *would* be subject to CWA permitting requirements. These resulting discrepancies in the treatment of identical entities are contrary to the purpose of consistent enforcement of the environmental laws and their resulting economic impact. Within the First Circuit, for example, its decision is likely to have a major adverse impact on the ski industry in three states in New England — Massachusetts, New Hampshire and Maine — compared to neighboring Vermont and New York.

Indeed, the interpretation now governing in New Hampshire and throughout the First Circuit and several other Circuits, set in the instant case, marks a radical departure from the traditional concepts and analysis of the CWA which affect a myriad of entities other than ski facilities. Specifically, the First Circuit has decreed that any water which "leaves the domain of nature" is subject to regulation under the CWA. Appendix A, Op. at 49a. This broad interpretation would affect businesses, municipalities, public works, and individuals, none of whom currently have NPDES permits. For example, almost every water supply facility releases some water back to its source as part of its routine operations. All hydroelectric facilities enclose water for some period as do flood control dams or spillways. Most

fire departments on a coast or near a river have one or more fire-fighting barges that would require permits. Without review from this Court to clarify the reading from the CWA, the aforementioned entities may be forced to apply, perhaps unnecessarily, for permits, invest unnecessary amounts of time and money, and perhaps cease operations in an effort to comply when Congress never anticipated nor intended that all of these entities be subject to the NPDES requirements. In addition this would impose a large regulatory burden on an understaffed EPA and on state agencies which will, in turn, result in lengthy permitting delays. Without review by this Court, great expense and injustice to a broad base of public, commercial, and individual entities could result and the law of the federal appeals courts will remain unsettled.

II.

AN AGENCY IS NOT REQUIRED UNDER NEPA TO CONSIDER ADDITIONAL MITIGATION ALTERNATIVES WHEN NO ADDITIONAL MITIGATION IS NECESSARY.

Whether the courts can require examination of further mitigation alternatives once mitigation is deemed satisfactory in a full NEPA process has important federal policy implications for NEPA reviews. It is likely to arise again in similar factual situations, but evade meaningful judicial review because of the cost and expense of the NEPA process and the comparative rarity of full-fledged NEPA appeals. In the instant case, the Circuit Court's decision on this issue is an unwarranted expansion and extension of NEPA procedures that will have a nationwide effect.

In its NEPA proceedings, the Forest Service considered the return of water from Loon's snowmaking system as a means of mitigating the impact of incremental water withdrawal on Loon

Pond, and deemed this mitigation measure fully and completely satisfactory. Nevertheless, the Circuit Court determined that, by failing to consider the use of holding ponds as a possible mitigation measure, the Forest Service had "not vigorously explored all reasonable alternatives." Appendix A, Op. at 27a, 28a-30a. In essence, the Circuit Court found that, merely because such measures had been suggested during the public comment period, the Forest Service was bound to consider them. In the Court's view, the Forest Service's failure to do so rendered the ROD fatally defective. In reaching its conclusion, the First Circuit diverged from other circuit law, and expanded and misread NEPA.

The First Circuit correctly noted that, in exploring projects, an agency is required to review all reasonable alternatives to a **project**. The cases so holding, however, focus exclusively on the projects themselves and not on the **mitigation** measures for each alternative **project**. It is this point that distinguishes requirements of examining all reasonable alternatives to a proposed **project** from examining all alternatives to **mitigation** of the effects of that project. The purpose served by looking at all **project** alternatives is clear: any project is likely to have many impacts that can only be understood by a thorough review of all possible project alternatives and impacts. In contrast, consideration of alternatives for **mitigation** is necessary only up to the point at which the impact is resolved. If an agency were considering a project that did not involve incremental water discharges and had no other adverse water quality impacts, for example, no mitigation concerning water discharges would need to be considered. No one would suggest that the process was inadequate if it failed to consider all mitigation alternatives that could be implemented; such a review would be unnecessary to accomplish the "no adverse impacts" goals of NEPA.

That same analysis applies when mitigation is deemed

satisfactory. It is, in essence, the same as if no adverse impact occurred at all. Once adverse impacts are satisfactorily mitigated, no further alternatives need be examined. To take a medical analogy, once the disease is cured, the doctor's job is done. The doctor may still have other medicines in his or her bag, but there is no need to explore their use and it would be pointless and economically wasteful to do so.

Applying this point to the specific context of the present case, there is no dispute that the suggested holding ponds are exclusively mitigation measures.[9] Appendix A, Op. at 29a. In this case, the ***project*** was the additional skiing development. That project has certain environmental ***impacts***. The purpose of NEPA is to examine which impacts are adverse. For these impacts, and only the adverse impacts, NEPA required that the Forest Service explore ***mitigation*** to reduce or eliminate those adverse impacts. Ultimately, however, the focus of the NEPA process is to explore the project and its alternatives; mitigation actions are purely derivative and are only necessary *to the extent* that a proposed project has adverse impacts.

This distinction between project alternatives and derivative mitigation measures, has been implicitly recognized in NEPA decisions in circuits around the country, but has not been expressly stated as such. *See City of Carmel-By-The-Sea v. United States Dep't of Transportation*, 95 F.3d 892, 908-09 (9th Cir. 1996) (holding that a final EIS "adequately proposes a mitigation plan for Monterey Pines in Hatton Canyon" where the plan "would mitigate the impact to the native Monterey pine forest to a non-significant level through replacement of trees removed with plantings of the same genetic stock") (quoting

9. It is, of course, possible to envision another situation in which the project proponent seeks to create a pond as a "project" for fishing or recreation. In that event, the NEPA process would explore the pond's impact and then determine what mitigation, if any, was appropriate.

relevant portion of the record); *Environmental Defense Fund v. Hoffman*, 566 F.2d 1060, 1071 (8th Cir. 1977) (upholding adequacy of final EIS that discussed mitigation plan adopted by Congress for water channelization project); *Pennsylvania Protect Our Water & Envtl. Resources, Inc. v. Appalachian Regional Comm'n*, 574 F. Supp. 1203, 1227 (M.D. Pa. 1982) (holding that mitigation plan that offset adverse impacts to wetlands was adequate for purposes of NEPA); *Davison v. Department of Defense*, 560 F. Supp. 1019, 1029-31 (S.D. Ohio 1982) (upholding adequacy, for NEPA purposes, of mitigation measures proposed by Air Force for controlling noise associated with conversion of airport from military to civilian use). *Cf. West Branch Valley Flood Protection Ass'n v. Stone*, 820 F. Supp. 1, 8 (D.D.C. 1993) ("NEPA does not require that a complete mitigation plan be actually formulated and incorporated into the EIS. Consequently, as long as the mitigation measures discussed in the EIS are sufficient to demonstrate a realistic look by the agency at the adverse impacts of the project, the agency is free to finally adopt a modified mitigation plan.") (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989)).

In this light, the First Circuit's decision conflicts with the majority view of the circuits that have spoken on this issue. As a result, there is a conflict in law that cannot be reconciled. Just as important, it puts project proponents — and the United States — in an untenable situation. NEPA must be applied consistently. This divergence defeats such uniformity and, therefore, inhibits fair review and analysis of projects in different parts of the country. Indeed, it puts projects that cross circuit lines in an unsolvable dilemma.

III.

WHEN EVERY ELEMENT OF A PROJECT ALTERNATIVE IS CONSIDERED AS A PART OF OTHER ALTERNATIVES, FURTHER NEPA ANALYSIS OF THE FINAL ALTERNATIVE IS NOT NECESSARY.

The degree to which — and the form in which — an agency must consider various project alternatives under NEPA has not been firmly established by the circuit courts. Without guidance from this Court, agencies will, in light of the First Circuit's decision in the present matter, be left to wonder about the extent to which each part of an alternative must be considered or reconsidered. In the instant case, for example, the Forest Service had exhaustively analyzed the components of the chosen alternative (*i.e.*, Alternative 6) in various other forms. On the critical issues of water-withdrawal and discharge — as well as visual impact, socio-economic impact, and impact on the flora and fauna of South Mountain — Alternative 6 presented no new issues. Nevertheless, the First Circuit found that the Forest Service's failure to review the elements of Alternative 6 *in that specific combination* was insufficient. Such questions about the sufficiency of an agency's review of alternatives lie at the "heart of the environmental impact statement," 40 C.F.R. § 1502.14, and, without the resolution of this substantial question, agencies may feel compelled to examine the slightest permutation as a new alternative, thereby unnecessarily protracting the already long, burdensome, and expensive NEPA process.

Logic and common experience indicate that there are always an infinite number of variations for even the simplest project. NEPA does not require that the federal agency engaging in review examine *every* conceivable variation of a project or mitigation alternative. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551

(1978); *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1181 (9th Cir. 1990) (An agency's "consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every reasonable alternative."). Instead, the agency is mandated to review categories or classes of impacts and to compare and contrast different types of impacts to evaluate the environmental impact of any particular project. *See generally* Daniel R. Mandelker, *NEPA Law and Litigation* §§ 9.05, 10.09 (2nd ed. 1994). *Cf.* 36 C.F.R. § 219.12(f)(1) (Forest Service regulation requiring that, in undertaking NEPA review for the preparation, revision, or amendment of forest plans, the Forest Service must formulate alternatives that are "distributed between the minimum resource potential and the maximum resource potential to reflect to the extent practicable the full range of major commodity and environmental resource uses and values that could be produced from the forest. Alternatives shall reflect a range of resource outputs and expenditure levels."). The variations that the agency must consider, however, focus on *qualitative*, not quantitative, differences. *See Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1114 (N.D. Tex. 1985) ("A mere change in the quantity of land for a project does not alone constitute a project change or basis for supplementing the EIS. These changes must be viewed in terms of their environmental impact.") (*citing Environmental Defense Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981)). *Cf. Valley Citizens For A Safe Environment v. Aldridge*, 886 F.2d 458, 467 (1st Cir. 1989) (Breyer, J.) (Air Force's failure in project EIS to discuss impacts associated with the release of between 50 to 75 tons per year of nitrous oxide from cargo planes was not relevant for NEPA purposes when considered in the larger environmental context in which the project was being undertaken.).

In the case below, every element of Alternative 6 was well within the spectrum of the various other alternatives fully

analyzed by the Forest Service. All elements of Alternative 6 were represented and analyzed in various other alternatives. Thus, on the critical uses of water — withdrawal and discharge — as well as visual impact, socio-economic impact, and impact on the flora and fauna of South Mountain, Alternative 6 presented no new mitigation alternative. The specific factors raised in the First Circuit's decision, Appendix A, Op. at 38a, had all been fully analyzed and reviewed.

To focus on a specific example, there was a meaningful difference between total annual snowmaking water demand of 193 million gallons as anticipated by Alternative 2 and either the 134 million gallons of Alternative 3 or the 118 million gallons of Alternative 4. Such large shifts from one class of impacts to another reflect meaningful differences to the environment. Thus, it can fairly be said that the snowmaking water demand of Alternative 3 was not comprehended by Alternative 2, and possibly not by Alternative 4.

In contrast, however, there was *not* a meaningful difference between a water demand of 134 million gallons (Alternative 2) and a water demand of 138 million gallons (Alternative 6). At the level of analysis conducted by the Forest Service — which is apparent from the ROD and not meaningfully challenged before the courts below — such a variation (3%) is not meaningful. Put another way, combing through the administrative record, it would be impossible to point to any evaluation, calculation, or analysis which would come out differently based on that minimal increment. *Cf. Sierra Club v. Marsh*, 744 F. Supp. 352, 367 (D. Me. 1989) ("For a supplemental EIS to be required [for a project change], 'new circumstances must present a *seriously* different picture of the environmental impact of the proposed project from what was previously envisioned.' ") (*quoting Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)) (emphasis in original); *West*

Branch Valley, 820 F. Supp. at 8-9 (Agency decisions not to divert underground stream, to eliminate three of four proposed pumping stations, to reduce diameter of holding ponds for contaminated water from 48.2 to 21.7 acres, and to increase the size of the pipes used to draw off water from the holding ponds, all in connection with mitigation plans for project under NEPA review, were "not such 'substantial changes' as to require supplementation of the EIS."); *Pennsylvania Protect Our Water,* 574 F. Supp. at 1226-27 (realignment of access road to serve recreational project did not require preparation of supplemental EIS even though the realignment affected certain small wetlands areas). It is for that reason that the First Circuit's suggestion that a new alternative can be adopted only if it is a "miniature" of a previously considered alternative, Appendix A, Op. at 38a, misperceives the deference courts must give to the Forest Service's discretion and misapprehends NEPA procedure. As designed by the Forest Service — in accordance with traditional NEPA procedures — the EIS process reviewed each alternative at every stage on a topic-by-topic basis.

The First Circuit's decision, therefore, contrasts sharply with the guidance of other courts that have reviewed the NEPA process. It also substantially changes the relationship between the courts and the agencies. As a practical matter, almost every ROD modifies the agency's initial preferred alternative in some fashion; under the logic of the First Circuit the courts will have almost unfettered discretion to determine what necessitates full NEPA review rather than deferring to the agency as is proper. *See Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci,* 857 F.2d 505, 508-09 (9th Cir. 1988) (" '[A]gencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input,' without having to circulate a supplemental draft EIS describing the proposed action. The agency need not circulate a supplemental draft EIS if (1) '*the alternative finally selected by (the agency) was within the range*

of alternatives the public could have reasonably anticipated (the agency) to be considering,' and (2) if 'the public's comments on the draft EIS alternatives also apply to the chosen alternative and inform (the agency) meaningfully of the public's attitudes toward the chosen alternative.' ") (emphasis added) (quoting *California v. Block*, 690 F.2d 753, 771-72 (9th Cir. 1982)).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue on the stated questions.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED DECEMBER 19, 1996

Nos. 96-1015
96-1086

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROLAND C. DUBOIS AND RESTORE: THE NORTH WOODS,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., and LOON MOUNTAIN RECREATION CORPORATION,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COUNT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,

Coffin and Bownes, *Senior Circuit Judges*.

Appendix A

Roland C. Dubois *pro se.*

Cindy Ellen Hill for appellant RESTORE: The North Woods. *Jeffrey P. Kehne, Attorney*, with whom *Lois J.Schiffer*, Assistant Attorney General, *Sylvia Quast, John A. Bryson,* Attorneys, Environment & Natural Resources Division, U.S. Department of Justice, Washington, DC, *Paul M. Gagnon,* United States Attorney, *T. David Plourde,* Assistant United States Attorney, Concord, NH, *Wendy M. John, Stuart L. Shelton,* Office of the General Counsel, U.S. Department of Agriculture, Washington, DC, and *Leslie M. Auriemmo,* Office of the General Counsel, U.S. Department of Agriculture, Milwaukee, WI, were on brief for appellees U.S. Department of Agriculture; Daniel Glickman, Secretary, U.S. Department of Agriculture; Jack Ward Thomas, Chief, U.S. Forest Service; Robert Jacobs, Regional Forester, Eastern Region, U.S. Forest Service; Donna Hepp, Forest Supervisor, White Mountain National Forest.

James L. Kruse with whom *Gallagher, Callahan & Gartrell, P.A.*, were on brief for appellee Loon Mountain Recreation Corporation.

December 19, 1996

BOWNES, *Senior Circuit Judge*. The defendant-intervenor Loon Mountain Recreation Corporation ("Loon Corp.") operates a ski resort in the White Mountain National Forest in Lincoln, New Hampshire. In order to expand its skiing facilities, Loon Corp. sought and received a permit to do so from the United States Forest Service.[1] Appellant Roland Dubois sued the Forest

1. The Forest Service, its parent organization, the United States Department of Agriculture, and their agents will be collectively referred to as "the Forest Service" throughout this opinion.

Service alleging violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 501, *et seq.*, ("APA"), and Executive Order 11,990, 42 Fed. Reg. 26,961(1977), *reprinted as amended in* 42 U.S.C.A. § 4321 (West 1994). Appellant RESTORE: The North Woods ("RESTORE") intervened as a plaintiff claiming violations of the same statutes, and appellee Loon Corp. intervened as a defendant. Dubois and RESTORE (collectively referred to as "plaintiffs") and the Forest Service filed cross-motions for summary judgment, and Loon moved to dismiss. The district court granted the Forest Service's motion for summary judgment and denied the other motions. We affirm in part, reverse in part, and remand.

I. STATEMENT OF THE CASE

A. Facts

The White Mountain National Forest ("WMNF") is a public resource managed by the United States Forest Service for a wide range of competing public uses and purposes, including "outdoor recreation, range, timber, watershed, . . . wildlife and fish purposes," 16 U.S.C. § 528 (1994), and skiing, 16 U.S.C. § 497(b) (1994). Pursuant to the National Forest Management Act of 1976, the Forest Service makes long-term plans to coordinate these competing uses, 16 U.S.C. § 1604(e)(1) (1994), and issues "special use" permits authorizing private recreational services on national forest land, 36 C.F.R. §§ 251.50-.65 (1995). The Forest Service's exercise of its permitting authority is legally constrained by environmental considerations emanating, *inter alia*, from NEPA, the CWA, and Executive Order 11,990.

Appendix A

Loon Pond is located in the WMNF at an elevation of 2,400 feet. It has a surface area of 19 acres, with shallow areas around the perimeter and a central bowl 65 feet deep. It is unusual for its relatively pristine nature. There is virtually no human activity within the land it drains except skiing at the privately owned Loon Mountain Ski Area. New Hampshire Department of Environmental Services ("NHDES") regulations classify Loon Pond as a Class A water body, protected by demanding water quality standards under a variety of criteria, *see* N.H. Code Admin. R. Env-Ws 432.03, and as an Outstanding Resource Water ("ORW"), protected against any measurable long-term degradation by the State's anti-degradation rules, *see id.* 437.06; 40 C.F.R. § 131.12(a)(3) (1995). It ranks in the upper 95th percentile of all lakes and ponds in northern New England for low levels of phosphorus, which results in limited plant growth and therefore high water clarity and higher total biological production. The pond supports a rich variety of life in its ecosystem. Loon Pond also constitutes a major source of drinking water for the town of Lincoln 1,500 feet below it. A dam across the outlet of the Pond regulates the flow of water from the Pond to Lincoln's municipal reservoir.

Loon Corp., defendant-intervenor herein, owns the Loon Mountain Ski Area, which has operated since the 1960s not far from Loon Pond. Prior to the permit revision that gave rise to this litigation, Loon Corp. held a special use permit to operate on 785 acres of WMNF land. That permit allowed Loon Corp. to draw water ("drawdown") for snowmaking from Loon Pond, as well as from the East Branch of the Pemigewasset River ("East Branch") and from nearby Boyle Brook. In order to use water from Loon Pond, Loon Corp. also needed authorization from the Town of Lincoln and the State of New Hampshire. Beginning in 1974, Loon Corp. was authorized to pump snowmaking water

from Loon Pond down to 18 inches below full level.[2] A 1988 amendment to this agreement permitted drawdown below the 18-inch level on a case-by-case basis. Combined uses by Lincoln and Loon Corp. during the period governed by these agreements typically caused four- to six-foot fluctuations in the level of Loon Pond.

In addition to being used as a source of water for snowmaking, Loon Pond has been the repository for disposal of water after it is pumped through the snowmaking system.[3] This includes water that originally came from Loon Pond, as well as water that originated in the East Branch or in Boyle Brook. Approximately 250,000 gallons of East Branch water have been transferred into Loon Pond each year in this manner. Obviously the water discharged into Loon Pond contains at least the same pollutants that were present in the intake water. Evidence in the record indicates that intake water taken from the East Branch contains bacteria, other aquatic organisms such as Giardia lambia, phosphorus, turbidity and heat. Evidence was also introduced in court, but not available prior to the issuance of the Environmental Impact Statement ("EIS"), that oil and grease were present in the discharge water, although their source was disputed.

In 1986, Loon Corp. applied to the Forest Service for an amendment to its special use permit to allow expansion of its

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2. The level of Loon Pond drops when Pond water is used for snowmaking, because the Pond does not receive much natural water through precipitation during the winter.

3. In order for Loon Corp. to make snow, it must pump significantly more water through the system than is actually made into snow. Passing this extra water through the pipes keeps them from freezing. It also provides the pressure that forces the artificial snow out through snowmaking jets.

facilities within the WMNF. Pursuant to NEPA, 42 U.S.C. § 4332, the Service developed a draft EIS, and a supplement to the draft. Responding to criticism of the adequacy of those documents, the Forest Service issued a revised draft EIS ("RDEIS"), which was published for public comment. The RDEIS set forth five alternatives to meet the perceived demand for additional alpine skiing. All five were located at the Loon Mountain site.[4]

Many individuals and groups, including both plaintiffs, filed comments pointing out various environmental problems with each alternative that involved expanding the ski area. One lengthy comment from the U.S. Environmental Protection Agency ("EPA") expressed its concern that the use of Loon Pond for snowmaking purposes would "use Loon Pond like a cistern" instead of treating it "with care" because it is "acknowledged to be one of the rare high altitude ponds of its size in the White Mountains." Joint Appendix ("JA"), ' ol. II, Response to Public Comment on RDEIS at A-78. Other commenters suggested that Loon Corp. be required to build artificial water storage ponds, in order to eliminate the problem of depleting Loon Pond when withdrawing water for snowmaking as well as the problem of adding pollutants to Loon Pond when discharging water into the Pond after use.

During the EIS process, Ron Buso, a hydrologist for the WMNF, expressed concern to another Forest Service hydrologist

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4. The Forest Service's ten-year plan for the WMNF, issued in 1986, included plans for accommodating increased demand for downhill skiing. It determined that it would meet this demand through expansion of existing ski areas rather than through the creation of new ones. It did not discuss the possibility of meeting the demand through alternative sites outside the national forest.

that the proposed drawdown of Loon Pond by twenty feet was likely to have a severe impact on the Pond. He explained that natural snowmelt in New Hampshire is extremely acidic and that, as a result of the planned draw down, a substantial amount of acidic snowmelt would remain in Loon Pond, increasing the Pond's acidity by a factor of two to three times what it would be without the planned drawdown. Without the drawdown, Loon Pond would be relatively full in the spring, and much of the snowmelt from surrounding higher elevations would glide over the surface of the Pond and down the mountain without significantly mixing with other Loon Pond water. According to Buso and a number of scientists whose affidavits were submitted to the district court, the increase in the Pond's acidity due to the planned drawdown would change the chemistry of the Pond, cause toxic metals to be released from the sediment, and kill naturally occurring organisms.

Without addressing the issues raised in the Buso memorandum or in the comments suggesting artificial storage ponds, the Forest Service prepared a Final EIS ("FEIS"). The FEIS added a sixth alternative, also on the Loon Mountain site. The new alternative provided for expansion of Loon Corp.'s permit area by 581 acres and for the construction of one new lift and approximately 70 acres of new ski trails, changes designed to accommodate 3,200 additional skiers per day (from the current 5,800 per day). The Forest Service deemed Alternative 6 as the preferred alternative. Under it, Loon Corp. would more than double the amount of water used for snowmaking, from 67 million gallons per year to 138 million gallons. Seventeen million gallons of the increase would be drawn from the East Branch, and 54 million gallons from Loon Pond. In addition, Loon Corp. was authorized to draw the Pond down for snowmaking by fifteen feet, compared to the current eighteen inches. The Forest Service assumed that the Town of

Lincoln would need up to an additional five feet of Pond water, making a total of twenty feet that the Pond was expected to be drawn down each year. This would constitute approximately 63% of the Pond's water. In March 1993, the Forest Service published a Record of Decision (ROD) adopting Alternative 6.

As a mitigation measure to blunt the adverse environmental impact on Loon Pond, the Forest Service required Loon Corp. to pump water from the East Branch to Loon Pond in December and May of each year if the Pond was not otherwise full at those times. In its FEIS, the Forest Service recognized that the East Branch is a relatively unprotected Class B waterway under New Hamspshire law, and that transfer of East Branch water to Loon Pond, a protected Class A water body and Outstanding Resource Water under state and federal law, would introduce pollutants into the Pond. Accordingly, it specified that this transfer of East Branch water could not occur if it exceeded certain levels of turbidity, bacteria, or oil and grease. Neither the FEIS nor the ROD set any limits, however, on the level of non-bacterial organisms such as Giardia lambia or on pollutants such as phosphorus that may be present in the transferred water. Nor did the FEIS indicate an alternative means of refilling Loon Pond — with clean water — if conditions were such that the transfer of East Branch water would exceed the specified levels.[5] It did, however, provide a series of restrictions and monitoring requirements for water levels and water quality, including daily testing of the transferred water for turbidity, bacteria, and oil and grease.[6]

5. As noted *supra*, absent some other method of refilling, the Pond would be refilled by the melting of acidic snow.

6. In response to an earlier draft EIS, the EPA had expressed the following concern: "While monitoring plans have merit, they should not be considered a substitute for a thorough evaluation of a project and its potential

(Cont'd)

Dubois and RESTORE appealed the ROD to the Regional Forester and, thereafter, to the Chief of the Forest Service. These appeals were denied. On March 16, 1994, the Forest Service issued a special use permit to Loon Corp., implementing the decision described in the ROD.

B. Proceedings Below

Plaintiff Dubois filed a complaint in the United States District Court for the District of Columbia,[7] challenging the Forest Service's approval of the Loon Mountain expansion project. He made three arguments.[8] First, he argued that the Forest Service actions violated the CWA because they would lead to violations of state water quality standards which, he asserted, have the effect of federal law because they were approved by the federal EPA. Second, he argued that the Forest Service violated both NEPA and Executive Order 11,990 by failing to consider alternatives to the use of Loon Pond and failing to develop adequate mitigation measures. Finally, he argued that the Forest Service violated the CWA, 33 U.S.C. § 1311, by failing to obtain a National Pollutant Discharge Elimination System ("NPDES") permit before approving Loon Corp.'s expansion plans, which entailed removing water from

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impacts prior to action approval." JA, vol. I, at 97; *see also Massachusetts v. Watt*, 716 F.2d 946, 951-52 (1st Cir. 1983) (NEPA "requires an EIS according to its terms," before the agency becomes "committed to [a] previously chosen course of action").

7. The case was later transferred to the United States District Court for the District of New Hampshire.

8. Plaintiffs made other arguments below, but have not pursued them on appeal.

the East Branch, using it to pressurize and prevent freezing in its snowmaking equipment, and then discharging the used water into Loon Pond. According to Dubois, an NPDES permit was required in order for Loon Corp. to discharge pollutants into Loon Pond, including the discharge from Loon Corp.'s snowmaking equipment.

Plaintiff RESTORE, a membership organization, intervened on behalf of its members to challenge the project. RESTORE first reiterated Dubois' claim that an NPDES permit was required. In addition, RESTORE claimed that the Forest Service violated NEPA by failing to prepare a Supplemental EIS after it developed Alternative 6 as the preferred alternative. According to RESTORE, this new alternative, not specifically mentioned in the previously published draft EIS or RDEIS, contained substantial changes to the proposed action that are relevant to environmental concerns, which required a supplemental EIS under NEPA and relevant implementing regulations. Finally, RESTORE claimed that a supplemental EIS was required because the Forest Service's Final EIS failed to "rigorously explore and objectively evaluate all reasonable alternatives" that are capable of meeting the stated goals of the project, as required by 40 C.F.R. § 1502.14 (1995). According to RESTORE, the asserted goal of meeting skier demand could have been met by expanding ski areas other than Loon, in particular, ski areas located outside the White Mountain National Forest.

The parties cross-moved for summary judgment. Loon Corp. intervened, and moved to dismiss on the ground that both plaintiffs lacked standing. The district court denied Loon Corp.'s motion to dismiss, granted summary judgment for the Forest Service, and denied the plaintiffs' cross-motions for summary judgment.

Appendix A

II. DUBOIS' STANDING[9]

The ingredients of standing are imprecise and not easily susceptible to concrete definitions or mechanical applications. *Allen v. Wright*, 468 U.S. 737, 751 (1984). In order to have standing to sue, a plaintiff must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186,204 (1962).

Standing consists of both a constitutional aspect and a prudential aspect. The constitutional dimension derives from the requirement that federal courts can act only upon a justiciable case or controversy. U.S. Const. art. III. If a party lacks Article III standing to bring a matter before the court, the court lacks subject matter jurisdiction to decide the merits of the underlying case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

To satisfy the constitutional component of standing, a plaintiff must have suffered an "injury in fact," *i.e.*, an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). That injury must be "concrete and particularized"; the latter term means the injury must be personal to the plaintiff. *Id.* at 560 & n.1. It may be shared by many others, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* , 412 U.S. 669, 687-88 (1973), but may not be common to everyone, *see Warth v. Seldin*, 422 U.S. 490, 499 (1975). The injury must also be "actual or imminent, not conjectural or hypothetical," *Defenders of Wildlife*, 504 U.S. at 560 (quotation omitted), and it must be "distinct and palpable,"

9. Defendants have abandoned their challenge to RESTORE's standing.

Warth, 422 U.S. at 501. The latter requirement may be satisfied by environmental or aesthetic injuries. *See SCRAP*, 412 U.S. at 686; *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). The injury need not be "significant"; a "small" stake in the outcome will suffice, if it is "direct." *SCRAP*, 412 U.S. at 689 n.14. In addition, the injury must be fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.[10] *Defenders of Wildlife*, 504 U.S. at 560-61.

The doctrine of standing also includes prudential relating to the proper exercise of federal jurisdiction. Among these concerns is the requirement that "a complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751. In addition, as a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. A membership organization constitutes an exception to this general rule: it may assert the claims of its members, provided that one or more of its members would satisfy the individual requirements for standing in his or her own right.[11] *See UAW v. Brock*, 477 U.S. 274, 281-82 (1986).

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10. Violations of procedural rights, such as those created by NEPA and CWA, receive "special" treatment when it comes to standing. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. As an example, the Supreme Court points to "the procedural requirement for an environmental impact statement before a federal facility is constructed next door" to the plaintiffs. *Id.* at 572. The contrasting example — where the disregard of procedural requirements would be held *not* to impair the plaintiffs' concrete interests — is "persons who live (and propose to live) at the other end of the country" from the project. *Id.* at 572 n.7.

11. An association must meet two other requirements in order to have

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The burden falls on the plaintiff "clearly to allege facts demonstrating that he is a proper party to invoke" federal jurisdiction. *Warth*, 422 U.S. at 518. The plaintiff must "set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing." *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife*, 504 U.S. at 561. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Id.* (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

The district court denied Loon Corp.'s motion to dismiss Dubois' claims on standing grounds, relying on our precedent in *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971-72 (1st Cir. 1993). In that case, we held that the court need not determine the standing of all plaintiffs if at least one plaintiff has standing to maintain each claim. The district court found that RESTORE had standing to bring all the claims at issue in this case, and, therefore, that the court could reach the merits of all claims without first addressing Dubois' standing. We agree that RESTORE would have standing to raise, on behalf of its members, all the issues in dispute in this litigation. But

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standing to sue: the interests that the suit seeks to vindicate must be germane to the objectives for which the organization was formed; and neither the claim asserted nor the relief requested requires the personal participation of affected individuals. *UAW v. Brock*, 477 U.S. 274, 282 (1986).

the district court erred in concluding that it could therefore reach the merits of all claims, because the district court's premise was incorrect: RESTORE did not, even at the district court level, raise the issues relating to Executive Order 11,990 and the state water quality standards, which only Dubois is pursuing here. The situation is not, therefore, analogous to *Washington Legal Foundation*; if Dubois has no standing, we cannot decide issues that RESTORE has never raised.

We find, however, that Dubois does satisfy all requirements for standing to litigate the claims he seeks to pursue on appeal. His second amended complaint[12] alleged that

> [his] principal residence from 1959-1977 was in Lincoln, New Hampshire. [He] has returned to the Lincoln area at least once per year — and occasionally up to twelve or more times per year — since 1977. During these trips, [he] has visited relatives and friends, collected botanical samples for scientific analysis, and engaged in recreational activities in and around the WMNF and the Loon Mountain Ski Area. Plaintiff's interest

12. Dubois moved for leave to file a third amended complaint and a reply brief. The district court failed to rule on this motion until after the court's jurisdiction was terminated by the docketing of RESTORE's appeal. Dubois asked this court to clarify the status of this motion in light of the district court's order granting Dubois' post-judgment motion under Fed. R. Civ. P. 60(a) for clarification; the court indicated that it had intended to allow the third amended complaint and the reply brief, but did not, due to clerical mistakes. Docket Entry 79-b. We need not decide Dubois' motion because of our decision on the merits. Resolving the motion would not, in any event, affect our decision on the standing issue, because the third amended complaint contains language identical to the second regarding standing.

> in the environmental, recreational and aesthetic quality of the WMNF are and will be adversely affected by the Defendants' actions challenged in this Complaint.

Second Amended Complaint, ¶ 5. The last sentence is rather conclusory, but the entire complaint, taken together with inferences reasonably drawn from its allegations, contains sufficient "reasonably definite factual allegations," *AVX*, 962 F.2d at 115, to survive a motion to dismiss.

"We are mindful that, under the notice pleading requirements of the federal rules, the allegations of the complaint should be construed favorably to the complainant on a motion to dismiss." *Papex Int'l Brokers v. Chase Manhattan Bank*, 821 F.2d 883, 886 (1st Cir. 1987). Moreover, as noted *supra*, at the pleading stage, "we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 504 U.S. at 561 (quotation omitted). Further, the record reveals that the district court had adduced additional information during its consideration of the standing issue. *See AVX*, 962 F.2d at 114 n.6 (appellate court considering standing issue went beyond the complaint "in a record-wide search for facts supporting" the claim of standing). Dubois' local counsel represented to the court that Dubois continues to return "regularly," at least annually, to his parents' home in Lincoln; that he drinks the water from the "Town of Lincoln water supply that comes down from Loon Pond"; that the "walks those mountains" in the WMNF. Transcript of Hearing, June 14, 1995, at 7-9. The court expressed its understanding of Dubois' standing allegations as follows:

> Mr. Dubois' injury in fact is he periodically comes back to the area and enjoys its natural

> beauty and will be injured by not being able to experience its natural beauty if the project is allowed to go forward? . . . It's not a case of someone who's simply saying I'm an environmentalist and I want to protect the environment, which everybody presumably has an interest in doing. It's somebody who says I'm back there a lot, I drink the water a lot, I'm up there in the woods a lot, and this is going to hurt me.

Id. at 8, 12.

We think it useful to compare the facts here with those alleged in *AVX*. 962 F.2d at 116-17. In *AVX*, the plaintiff organization had simply made conclusory allegations that its "members have been and will continue to be harmed by the releases that [were] the subject of [that] litigation"; its "averment [had] no substance: the members [were] unidentified; their places of abode [were] not stated; the extent and frequency of any individual use of the affected resources [was] left open to surmise." *Id.* This court in *AVX* pointed to the allegations in *SCRAP*, 412 U.S. 669, as attenuated as they were, in which "there was a geographic nexus; all the association's members resided in a single, defined metropolitan area, directly affected by the challenged action. . . . In *SCRAP*, unlike [*AVX*], the claimed environmental injury was tied to the particular pursuits of particular persons." *AVX*, 962 F.2d at 117.

The instant case, in contrast with *AVX*, presents a particular person, whose family home is located squarely within the geographical area allegedly directly affected by the proposed project, who visits the area regularly, who drinks the water

which will allegedly be tainted by pollutants, and who will allegedly be deprived of his environmental, aesthetic and scientific interests in ways directly tied to the project he challenges. These are the types of interests which the Supreme Court has held — when asserted by an organization such as RESTORE on behalf of its members — satisfy the constitutional requirements for standing. *See SCRAP*, 412 U.S. at 685-87; *Sierra Club v. Morton*, 405 U.S. at 734-35 & n.8; *see also supra*, note 10. There is certainly no reason why an organization would have standing to raise these interests on behalf of its members, but an individual such as Dubois would not have standing to raise the same interests on his own behalf.

Thus, with the degree of specificity necessary at the pleading stage, Dubois has articulated — directly and by inference — how his personal interests will be adversely affected by the Loon expansion proposal.[13] Finally, his injuries are "likely to be redressed" by the relief he has requested in the complaint: *inter alia*, an injunction against the project's proceeding. *See Defenders of Wildlife*, 504 U.S. at 560-61.

As for the prudential standing requirements, there is no dispute that the violations and injuries alleged in the complaint

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13. Our analysis is not altered by the fact that three of the parties filed cross-motions for summary judgment. The standing issue was raised only in Loon Corp.'s motion to dismiss. Where, as here, the defendants have not contradicted the factual allegations concerning standing that we deem adequate at the motion to dismiss stage, we will not subject those allegations to a summary judgment level of scrutiny in the absence of a motion for summary judgment on the issue. In these circumstances, "[t]he standing analysis is no different, as a result of the case having proceeded to summary judgment, than it would have been at the pleading stage." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 n.15 (1976).

are the sort that NEPA, the CWA, and the Executive Order were "specifically designed" to protect. *See Lujan v. National Wildlife Federation*, 497 U.S. at 886. Moreover, our discussion above related only to Dubois' own legal rights and interests, not those of third parties. Accordingly, we find that Dubois has standing to litigate the claims he seeks to pursue on appeal.

III. STANDARD OF REVIEW

The district court's order granting summary judgment is subject to *de novo* review. *Borschow Hosp. and Medical Supplies v. Cesar Castillo, Inc.*, 96 F.3d 10, 14 (1st Cir. 1996); *Lawrence v. Northrop Corp.*, 980 F.2d 66, 68 (1st Cir. 1992). We independently weigh the merits of the summary judgment motions "without deference to the reasoning of the district court." *Hughes v. Boston Mut. Life Ins. Co.*, 26 F.3d 264, 268 (1st Cir. 1994). Accordingly, we must reverse the court's grant of summary judgment unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In analyzing the issues, we will review the record in the light most favorable to the non-movants, and make all inferences in their favor. *Borschow*, 96 F.3d at 14; *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 31 (1st Cir. 1990).

It is well established that a reviewing court may not set aside administrative decisions "simply because the court is unhappy with the result reached." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.* ("*NRDC*"), 462 U.S. 87, 97 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)). The fundamental policy questions are "appropriately resolved in Congress and in the state legislatures"; they "are *not* subject to reexamination in the

federal courts under the guise of judicial review of agency action."[14] *Vermont Yankee*, 435 U.S. at 558. Courts may set aside agency decisions "only for substantial procedural or substantive reasons as mandated by statute." *Id.*

The applicable statutes here are NEPA and the CWA. NEPA requires that the agency take a "hard look" at the environmental consequences of a project before taking a major action. *Baltimore Gas*, 462 U.S. at 97 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). It is the role of the courts on judicial review to ensure "that this legal duty is fulfilled." *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985).

Congress, in enacting NEPA, meant "to insure a fully informed and well-considered decision." *Vermont Yankee*, 435 U.S. at 558. But NEPA "does not mandate particular results"; it "simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.; see also Baltimore Gas*, 462 U.S. at 97. Thus, "[t]he role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions *and* that its decision is not arbitrary or capricious." *Baltimore Gas*, 462 U.S. at 97-98 (emphasis added).

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14. For example, in *Vermont Yankee*, Congress had made the policy decision that the nation would try nuclear power; the Court refused to second-guess that decision in reviewing an EIS pursuant to NEPA. 435 U.S. at 557-58.

Like NEPA, the CWA does not articulate its own standard of review; therefore the appropriate scope of review for both NEPA claims and CWA claims is the standard set forth in the APA. 5 U.S.C. § 706(2)(A) (1994); *see Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1445 (1st Cir. 1992); *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 851-52 (9th Cir. 1987).

Under the APA, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Errors of law are reviewed by the court *de novo*. 5 U.S.C. § 706 (1994) ("the reviewing court shall decide all relevant questions of law"); *Howard v. FAA*, 17 F.3d 1213, 1215 (9th Cir. 1994).

On the other hand, the task of a court reviewing agency action under the APA's "arbitrary and capricious" standard, 5 U.S.C. § 706(2), is "to determine whether the [agency] has *considered the relevant factors* and *articulated a rational connection* between the facts found and the choice made." *Baltimore Gas*, 462 U.S. at 105 (emphasis added) (citations omitted); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971). If the agency decision was based on a consideration of the relevant factors *and* there has not been a "clear error of judgment," then the agency decision was not arbitrary or capricious. *Overton Park*, 401 U.S. at 416; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

In *State Farm*, the Supreme Court offered several examples of circumstances in which an agency action "normally" would

be considered arbitrary and capricious: situations where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. These are merely "examples," *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 77 (1st Cir. 1993); others could be recited as well. Whether reviewing an EIS or a rulemaking proceeding, the "reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

"While this is a highly deferential standard of review, it is not a rubber stamp." *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 290 (1st Cir. 1995). Although "the ultimate standard of review is a narrow one," the court must undertake a "thorough, probing, in-depth review" and a "searching and careful" inquiry into the record.[15] *Overton Park*, 401 U.S. at 415-16. In order for an agency decision to pass muster under the APA's "arbitrary and capricious" test, the reviewing court must determine that the decision "makes sense." *Puerto Rico Sun Oil*, 8 F.3d at 77. Only by "carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision" can the court "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Marsh*, 490 U.S. at 378 (internal quotation omitted).

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15. We note that the two-step process articulated in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984), does not apply here, because we are not reviewing an agency's interpretation of the statute that it was directed to enforce.

Appendix A

IV. THE NEPA/EIS ISSUE

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, declares a broad national commitment to protecting and promoting environmental quality. *Robertson,* 490 U.S. at 348; 42 U.S.C. § 4331 (1994). The primary mechanism for implementing NEPA is the Environmental Impact Statement (EIS). 42 U.S.C. § 4332 (1994). The EIS is an "action-forcing" procedure, designed "[t]o ensure that this commitment is infused into the ongoing programs and actions of the Federal Government." *Robertson,* 490 U.S. at 348 (quotation omitted).

NEPA requires that an agency considering any action that would have a significant impact on the environment prepare an EIS. The EIS must contain a "*detailed* statement" including, *inter alia,* the environmental impacts of the proposed project, and all reasonable alternatives to the project. 42 U.S.C. § 4332(C) (emphasis added). We previously emphasized the word "detailed" because "it connotes the careful, reasoned and fully explained analysis which we think Congress intended." *Silva v. Lynn,* 482 F.2d 1282, 1284 n.2 (1st Cir. 1973). Thus, the EIS helps satisfy NEPA's " twin aims": to ensure that the agency takes a "hard look" at the environmental consequences of its proposed action, and to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process. *See Robertson*, 490 U.S. at 350, 356; *Baltimore Gas,* 462 U.S. at 97. The EIS thus "helps insure the integrity of the process of decision," providing a basis for comparing the environmental problems raised by the proposed project with the difficulties involved in the alternatives. *Silva v. Lynn,* 482 F.2d at 1285.

Appendix A

A. Consideration of Environmental Impacts

In its EIS, the agency must "consider every significant aspect of the environmental impact of a proposed action," *Baltimore Gas,* 462 U.S. at 97 (quoting *Vermont Yankee,* 435 U.S. at 553), and "evaluate different courses of action," *Kleppe,* 427 U.S. at 410. The EIS's discussion of environmental impacts "forms the scientific and analytic basis for the comparisons" of alternatives, 40 C.F.R. § 1502.16 (1995), which are "the heart" of the EIS, *id.* at § 1502.14; *see* Part IV(B), *infra.* The discussion of impacts must include both "direct and indirect effects (secondary impacts) of a proposed project." *Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir. 1992); 40 C.F.R. § 1502.16(b). The agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action. *Sierra Club v. Marsh,* 976 F.2d at 767. In this context, reasonable foreseeability means that "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Id.* An environmental effect would be considered "too speculative" for inclusion in the EIS if it cannot be described at the time the EIS is drafted with sufficient specificity to make its consideration useful to a reasonable decision-maker. *Id.* at 768. Nevertheless, "[r]easonable forecasting . . . is . . . implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry.' " *Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n,* 481 F.2d 1079, 1092 (D.C. Cir. 1973).

Plaintiffs contended in the district court that the Forest Service failed to adequately assess the impact of Loon Corp.'s planned expansion on Loon Pond. Plaintiffs listed a number of

specific areas of concern. The district court found the Forest Service's consideration of environmental impacts to be adequate, and plaintiffs have not appealed this point. Accordingly, we need not pursue this issue here.

B. Consideration of Alternatives

"[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences" of a proposed action. *Robertson*, 490 U.S. at 351. As one aspect of evaluating a proposed course of action under NEPA, the agency has a duty "to study all alternatives that appear reasonable and appropriate for study . . . , as well as significant alternatives suggested by other agencies or the public during the comment period." *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1047 (1st Cir. 1982) (quotations omitted); *Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 462 (1st Cir. 1989); *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 95 F.3d 892, 903 (9th Cir. 1996).

As stated in the Council on Environmental Quality ("CEQ") regulations implementing NEPA, the consideration of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. These implementing regulations are entitled to substantial deference. *Robertson*, 490 U.S. at 355 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)). The regulations require that the EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). It is "absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of

the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement.' " *NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975) (citation omitted); *see Silva v. Lynn*, 482 F.2d at 1285; *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (holding that a thorough discussion of the alternatives is "imperative"). "The 'existence of a viable but unexamined alternative renders an environmental impact statement inadequate.' " *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)); *see Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot "bring into compliance with NEPA an EIS that by itself is inadequate."). Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned. *Grazing Fields Farm*, 626 F.2d at 1072; *see Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983).

C. The Requisite Level of Detail

One purpose of the EIS requirement is to "provide decision makers with sufficiently detailed information to aid in determining whether to proceed with the action in light of its environmental consequences." *Northwest Resource Info. Ctr., Inc. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1064 (9th Cir. 1995). What level of detail is sufficient depends on the nature and scope of the proposed action. *Valley Citizens*, 886 F.2d at 463; *Mumma*, 956 F.2d at 1520. The discussion of environmental effects of alternatives need not be exhaustive. "[W]hat is required

is information sufficient to permit a reasoned choice of alternatives as far as environmental aspects are concerned," *All Indian Pueblo Council,* 975 F.2d at 1444 (quoting *NRDC v. Morton,* 458 F.2d 827, 836 (D.C. Cir. 1972)); *see also Carmel-By-The-Sea,* 95 F.3d at 903, information sufficient for the agency to "[r]igorously explore and objectively evaluate" all reasonable alternatives. 40 C.F.R. § 1502.14(a); *All Indian Pueblo Council,* 975 F.2d at 1444.

The courts have applied "a rule of reason in determining whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Carmel-By-The-Sea,* 95 F.3d at 899 (quotation omitted); *see also Grazing Fields Farm,* 626 F.2d at 1074; *Massachusetts v. Andrus,* 594 F.2d 872, 884 (1st Cir. 1979); *cf. Marsh,* 490 U.S. at 373 (supplemental EIS). One aspect of this determination is whether the agency has gone "beyond mere assertions and indicate[d] its basis for them." *Silva v. Lynn,* 482 F.2d at 1287. The agency "must 'explicate fully its course of inquiry, its analysis and its reasoning.' " *Massachusetts v. Andrus,* 594 F.2d at 883 (quoting *Silva v. Lynn,* 482 F.2d at 1284-85). The court must determine whether, in the context of the record, the agency's decision — and the analysis on which it is based — is too unreasonable for the law to permit it to stand. *See Sierra Club v. Marsh,* 976 F.2d at 769. We apply a rule of reason because courts should not "fly speck" an EIS and hold it insufficient based on inconsequential or technical deficiencies. *Swanson v. U.S. Forest Service,* 87 F.3d 339, 343 (9th Cir. 1996). "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible. . . . But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to the fullest extent possible." *Scientists' Inst.,* 481 F.2d at 1092 (quotations omitted). The agency must "squarely turn[ ]" all

"procedural corners" in its EIS. *Citizens Awareness Network*, 59 F.3d at 290 (quoting *Adams*, 38 F.3d at 49). The question whether a particular deficiency or combination is sufficient to warrant holding it legally inadequate, or constitutes merely a "fly speck," is essentially a legal question, reviewable *de novo*. *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 493 (9th Cir. 1987).

Applying these standards to the instant case, we conclude that the Forest Service has not rigorously explored all reasonable alternatives, in particular the alternative that Loon Corp. be required to build artificial water storage ponds, instead of withdrawing water for snowmaking from, and discharging water into, an "outstanding resource water" like Loon Pond. The adverse environmental impacts of using Loon Pond were before the agency, and more than one commenter proposed building artificial water storage ponds, a proposal that would, on its face, avoid some of those adverse impacts. One such commenter, Paul Beaudin of the Lincoln Committee of Concerned Citizens (LCCC), enclosed clippings pointing up "the wisdom of [Loon Corp.'s] *need* to enact the LCCC's proposal for water containment pond[s] high up on the Boyle Brook." JA, vol. II, Response to Public Comment on RDEIS at A-12. The LCCC proposal itself, made two months earlier, referred to a letter from the National Ecology Research Center recommending consideration of water storage alternatives other than Loon Pond, and enclosed a map indicating where up to three containment ponds could be installed. LCCC listed some nine advantages, including the cost-saving factor of servicing two-thirds to three-fourths of Loon Corp.'s snowmaking system by gravity feed.[16]

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16. In addition to the Beaudin/LCCC proposal, plaintiff Dubois', comments also suggested that Loon Corp. build artificial water storage units, in his case underground. This suggestion, requiring costly subterranean

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Instead of "rigorously explor[ing]" the alternative of using artificial water storage units instead of Loon Pond, the Forest Service's Final EIS did not respond to these comments at all. The agency did not in any way explain its reasoning or provide a factual basis for its refusal to consider, in general, the possibility of alternatives to using Loon Pond for snowmaking, or LCCC's reasonably thoughtful proposal in particular.[17] This failure violated the Forest Service's EIS obligation under NEPA. *See* 40 C.F.R. § 1502.9(b) (1995); 42 U.S.C. § 4332(C)(iii) (1994).

The use of artificial storage ponds is not so facially implausible that it can be dismissed out of hand. The Forest Service, on another occasion, required the Sugarbush Ski Area in Vermont to construct, for its snowmaking operations, three artificial water storage ponds capable of holding 123.5 million gallons of water on 22.9 acres of private land. JA, vol. I, at 457, 465. This is 73% more than the 71 million gallons of water that the ROD estimates would be withdrawn from Loon Pond under the approved Loon Mountain expansion project. Beaudin/LCCC proposed constructing three similar ponds in the Boyle Brook area high up Loon Mountain. In addition, the record contains

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construction, may be more facially vulnerable than Beaudin/LCCC's; it may or may not alone have required an explicit response, however brief. But we need not address this question because we reverse based on the Beaudin/LCCC proposal.

17. Aside from its preservation argument, *see* Part IV(D), *infra*, the Forest Service merely argues that the LCCC proposal was made to Loon Corp. before the RDEIS was published. However, the Forest Service does not suggest that Beaudin's comment letter — responding to the Forest Service's RDEIS — did not fairly refer to the prior LCCC proposal, or that this proposal was unknown to the Service.

evidence that Loon Corp. owns 365 acres of private land at the base of the ski area, where similar storage ponds could be constructed, and that such ponds could be filled with water from the East Branch, which is typically high enough in the spring to contribute to flooding in downstream areas.

Our conclusion is buttressed by NEPA's requirement that an agency consider and an EIS discuss "steps that can be taken to mitigate the adverse environmental consequences" of a proposed project. *See Robertson,* 490 U.S. at 351. Even though there is no requirement that the agency reach a particular substantive result, such as actually formulating and adopting a complete mitigation plan, the agency must discuss "the extent to which adverse effects can be avoided," *i.e.,* by mitigation measures, "in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Id.* at 352. This duty — coupled with the comments alerting the agency to the environmental consequences of using Loon Pond for snowmaking and suggesting the containment pond solution — required the Forest Service to seriously consider this alternative and to explain its reasoning if it rejected the proposal.

Nor can the Forest Service claim that its failure to consider an alternative to using Loon Pond for snowmaking was a *de minimis* or "fly speck" issue. The record indicates serious adverse consequences to Loon Pond if it is used "as a cistern," to use EPA's words, and at least a reasonable probability that the use of artificial storage ponds could avoid those consequences. The existence of this non-*de minimis* "viable but unexamined alternative renders [the Loon EIS] inadequate." *See Resources, Inc.,* 35 F.3d at 1307.

After the matter had proceeded to court, counsel for the Forest Service argued that constructing artificial storage ponds

large enough to serve as an alternative to using Loon Pond would not be a viable alternative for reasons that were conclusorily stated. The district court accepted this argument. But this "*post hoc* rationalization of counsel" cannot overcome the agency's failure to consider and address in its FEIS the alternative proposed by commenters. *State Farm*, 463 U.S. at 50; *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *NRDC v. U.S. EPA*, 824 F.2d 1258, 1286 n.19 (1st Cir. 1987). Such *post hoc* rationalizations are inherently suspect, and in any event are no substitute for the agency's following statutorily mandated procedures. As noted *supra* even if the agency's actual decision was a reasoned one, the EIS is insufficient if it does not properly discuss the required issues. *Grazing Fields Farm*, 626 F.2d at 1072.

In sum, how "probing" an investigation NEPA requires of alternatives depends on the circumstances, including the nature of the action at issue. *Valley Citizens*, 886 F.2d at 463. Thus, the reviewing court must be flexible in evaluating the depth of analysis to require in an EIS, because, while NEPA "does not mandate particular results," it does require that the agency have adequately identified and evaluated a project's environmental consequences. *Robertson*, 490 U.S. at 350. "NEPA's success in large part arises from the use of legal concepts [that are flexible] such as 'reasonableness' and 'adequacy' that permit courts to adapt it successfully to so many different kinds of circumstances surrounding so many different kinds of governmental decisions." *Valley Citizens*, 886 F.2d at 463.

Although in *Valley Citizens* we found the agency's analysis of alternatives "brief but adequate," 886 F.2d at 462, the contrast with the instant case is instructive. In *Valley Citizens*, we found that nothing in the record or in comments on the draft "point[ed]

out any inaccuracy" in the agencies cost "descriptions" or in its "discussions" of other non-environmental considerations. *Id.* In contrast, in the instant case, the final EIS contains *no* "description" or "discussion" whatsoever as to why an alternative source of water such as an artificially created storage pond would be impractical. The agency has discretion to balance competing concerns and to choose among alternatives, but it must legitimately assess the relative merits of reasonable alternatives before making its decision.

After a searching and careful review of the record in the instant case, we are not convinced that the Forest Service's decision was founded on a reasoned evaluation of the relevant factors, *Marsh,* 490 U.S. at 378, or that it articulated a rational connection between the facts found and the choice made, *Baltimore Gas,* 462 U.S. at 105. Hence, it acted arbitrarily and capriciously in granting Loon Corp.'s special use permit for the expanded ski resort. Moreover, because the Forest Service did not satisfy the requirement that it "rigorously explore and objectively evaluate" all reasonable alternatives,[18] 40 C.F.R. § 1502.14(a), its decision was not in accordance with law.[19] *See* 5 U.S.C. § 706(2)(A).

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18. In addition to the question of an alternative to Loon Pond as a source of water or as a discharge point, plaintiff RESTORE has raised a second issue regarding alternatives. RESTORE asserts that the Forest Service should have considered alternative sites for the entire project, outside of the White Mountain National Forest. The district court found that such alternative sites were not appropriate for study because some draw from different markets and others do not offer the same type of skiing experience as the WMNF ski areas which have more terrain, higher mountains, more natural snow, and better facilities than their counterparts outside the WMNF. We agree.

19. Dubois also notes that the FEIS failed to disclose what he claims are numerous violations of state water quality standards, which "renders the (Cont'd)

D. The Preservation Issue

The Forest Service argues that plaintiffs have not preserved their argument that the agency should have more seriously considered, as an alternative to Loon Pond, some other source for water and some other location to discharge the effluent from Loon Corp.'s snowmaking pipes. It contends that plaintiffs failed adequately to raise their contentions during the public comment period, so they waived their right to pursue these challenges on their merits. The Forest Service argues that, "[i]f commenters could require agencies to undertake detailed comparative analyses merely by asserting the superiority of an alternative site, configuration or method, only the imaginations of project opponents would limit the length of EISs and the duration of the NEPA process." Forest Service Brief at 53. Raising the specter of catastrophe only obfuscates the real issues here: whether the Forest Service adequately considered alternatives to using Loon Pond as a vehicle for Loon Corp.'s snowmaking, with adequacy based on the reasonableness and practicality of the alternatives, and whether the Forest Service adequately explained in its FEIS why it decided against such alternatives.

The Forest Service relies on *Roosevelt Campobello*: "In order to preserve an alternatives issue for review, it is not enough simply to make a facially plausible suggestion; rather, an intervenor must offer tangible evidence that an *alternative site* might offer a substantial measure of superiority as a site." 684

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FEIS unacceptable under NEPA." Dubois Brief at 16 n.11 *see Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 587-88 (9th Cir. 1985), *rev'd on other Grounds sub nom. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). For discussion of the issue of state water quality standards, *see* Part VII(C), *infra*.

F.2d at 1047 (emphasis added) (quotation omitted). The Forest Service's reliance on *Roosevelt Campobello* is misplaced. That case, and the precedents it relied on, dealt with a claim that the agency had not considered all appropriate alternative *sites* on which to locate a particular project. Obviously, the number of potential locations for any project is infinite, and an agency cannot be expected to consider seriously every possible location before approving a project. In such a context, the agency is only required to consider "all alternatives which were feasible and reasonably apparent at the time of drafting the EIS." *Id.; see also Seacoast Anti-Pollution League v. Nuclear Regulatory Comm'n*, 598 F.2d 1221, 1229 (1st Cir. 1979) (Agency need not "ferret out every possible alternative, regardless of how uncommon or unknown.") (quoting *Vermont Yankee*, 435 U.S. at 551).

The situation in the instant case is wholly different. It is one thing to ask whether there are "known," "feasible," alternative *sites* on which to locate a project, and a different matter to ask whether the Forest Service in the instant case should have considered an alternative *means* of implementing the expansion of the Loon Mountain Ski Area — a particular means of operation that would do less environmental damage — without changing the site to another state or another mountain. Here, the Forest Service was alerted by commenters to the alternative of using artificial storage ponds instead of Loon Pond for snowmaking; but even without such comments, it should have been "reasonably apparent" to the Forest Service, *Roosevelt Campobello*, 684 F.2d at 1047, not "unknown," *Seacoast Anti-Pollution League*, 598 F.2d at 1229, that such an alternative existed.

In the instant case, at least two commenters, Paul Beaudin

of LCCC and plaintiff Dubois, provided notice to the Forest Service, informing it of the substance of their proposed alternative. Though not detailed, these comments submitted in response to the Forest Service's RDEIS made clear that the commenters thought the agency should consider some alternative source of water other than Loon Pond and some alternative place to discharge the water after it had gone through the snowmaking pipes. They argued that such an alternative would reduce the negative environmental impact on Loon Pond from depleting the pond's water and from refilling the pond with polluted water either from the East Branch or from acidic snowmelt. Dubois explicitly and Beaudin by reference suggested the possibility of new man-made storage units to accomplish these goals. These comments provided sufficient notice to "alert[ ] the agency" to the alternative being proposed and the environmental concern the alternative might address.[20] *See Seacoast Anti-Pollution League,* 598 F.2d at 1229 (quoting *Vermont Yankee,* 435 U.S. at 553).

Because the comments to the EIS were sufficient to notify the agency of the potential alternatives, *see Adams v. U.S. EPA,* 38 F.3d 43, 52 (1st Cir. 1994), the district court erred in concluding that plaintiffs were required to "offer[ ] specifics as to how to implement a suggested alternative water storage system." Memorandum and Order at 31. Such "specifics" are not required. As we reasoned in *Adams,* the purpose of public

20. In *Adams v. U.S. EPA,* 38 F.3d 43 (1st Cir. 1994), we held that a plaintiff had sufficiently raised his proposal at the agency level by stating in his comment: "The EPA has not carried out the intent of Congress in relation to the [Act in question, citing specific statutory provisions]." *Adams,* 38 F.3d at 52. This court held that that reference — together with other comments discussing the detrimental impact of the proposed project on beaches and marine life — was sufficient to "alert[ ] the EPA to [his] concern that the EPA had not adequately complied with the [statutory] mandates." *Id.*

participation regulations is simply "to provide notice" to the agency, not to "present technical or precise scientific or legal challenges to specific provisions" of the document in question. *Adams*, 38 F.3d at 52. "It would be inconsistent with the general purpose of public participation regulations to construe the regulations strictly." *Id.*

Moreover, NEPA requires the agency to try on its own to develop alternatives that will "mitigate the adverse environmental consequences" of a proposed project. *Robertson*, 490 U.S. at 351. "In respect to alternatives, an agency must *on its own initiative* study all alternatives that appear reasonable and appropriate for study at the time, and must also look into other significant alternatives that are called to its attention by other agencies, or by the public during the comment period afforded for that purpose." *Seacoast Anti-Pollution League*, 598 F.2d at 1230 (emphasis added).[21] Particularly given this directive, the alert furnished by Beaudin and Dubois required exploration and discussion by the Forest Service of the idea that environmental damage might be reduced by the use of artificial storage ponds instead of Loon Pond for snowmaking purposes. Therefore, the district court should have rejected the Forest Service's argument that Dubois failed to adequately preserve the issue of alternatives.

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21. In deciding whether an agency has adequately studied all reasonable alternatives, a reviewing court may consider "the extent and sincerity of the opponents' participation." *Seacoast Anti-Pollution League*, 598 F.2d at 1231. Here, it is apparent from the record that Dubois has treated this matter seriously, not as "a game," *id.* at 1229; he has not "played dog in the manger with respect to alerting the agency" to his views regarding alternatives, *id.*, in an effort to "scuttle" the project, *id.* at 1231.

V. SUPPLEMENTAL EIS

Plaintiffs also appeal the district court's conclusion that the Forest Service was not required, under NEPA, to prepare a supplemental EIS. The question of a supplemental EIS is premised on the dual purposes of the EIS: to assure that the public who might be affected by the proposed project be fully informed of the proposal, its impacts and all major points of view; and to give the agency the benefit of informed comments and suggestions as it takes a "hard look" at the consequences of proposed actions. *See Robertson,* 490 U.S. at 349, 356; 40 C.F.R. §§ 1502.1, 1502.9(a) (1995).

An agency "shall" prepare a supplemental EIS if, after issuing its latest draft EIS, "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i) (1995). The use of the word "shall" is mandatory, not precatory. It creates a duty on the part of the agency to prepare a supplemental EIS if substantial changes from any of the proposed alternatives are made and the changes are relevant to environmental concerns. *See Marsh,* 490 U.S. at 372. Thus, as explained by CEQ, an additional alternative that has not been disseminated previously in a draft EIS may be adopted in a final EIS, without further public comment, only if it is "qualitatively within the spectrum of alternatives that were discussed" in the prior draft; otherwise a supplemental draft is needed. *See* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18026, # 29b (1981).

Plaintiffs argue that the project proposed as Alternative 6, appearing for the first time in the Final EIS, embodies "substantial changes" from any of the alternatives proposed in the prior drafts of the EIS, and that those changes are "relevant

to environmental concerns." *See* 40 C.F.R. § 1502.9(c)(1)(i). Therefore, plaintiffs assert that, by not describing Alternative 6 in a supplemental EIS — which would give the public an opportunity to comment on it and give the Forest Service the benefit of those comments in its consideration of the environmental impact of Alternative 6 — the Forest Service collided with both the public information and the agency guidance objectives of NEPA. In response, defendants argue that plaintiffs' interpretation of the previously discussed alternatives is incorrect, because 6 is merely a scaled-down modification of 2 which, as proposed in two phases in the RDEIS, would have been far larger and far more intrusive on the environment than the new preferred Alternative 6. Plaintiffs reply that only Phase I and not Phase II of Alternative 2 was seriously considered and analyzed prior to the development of Alternative 6 in the final EIS.[22] Defendants deny this assertion.

We conclude, based on the record in this case, that a supplemental EIS was required. The scope of review of a reviewing court is the APA's "arbitrary and capricious" standard. *Marsh*, 490 U.S. at 375-76; *see* Part III, *supra*. The Court in *Marsh* was especially deferential to the "informed discretion of the responsible federal agencies," due to the "high level of technical expertise" required in that case to analyze the relevant documents regarding soil composition and a dam's impact on downstream turbidity. *Marsh*, 490 U.S. at 377, 379. In the instant case, however, nothing in the FEIS indicates that any such technically complex scientific analysis would be required in order for this court to determine that Alternative 6 involves a "substantial change" from the prior proposals at Loon Mountain.

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22. Plaintiffs point to several instances where the FEIS stated that further environmental analysis would be conducted in the future if and when Loon Corp. sought permission to proceed with Phase II.

Appendix A

Alternative 6, adopted by the Forest Service as its preferred alternative in the final EIS, does not fall "within the spectrum of alternatives" that were considered in previous drafts, even if Phase II of Alternative 2 had been adequately analyzed prior to the FEIS. Alternative 6 entails a different configuration of activities and locations, not merely a reduced version of a previously-considered alternative. Phase II of Alternative 2 proposed expanding the ski area primarily on land that is not within the current permit area; in contrast, Alternative 6 squeezes much of its expansion into that current permit area. To accomplish this, Alternative 6 widens existing trails so as to eliminate buffers that currently separate the trails. It also envisions a 28,500-square-foot base lodge facility within the existing permit area. And it develops ski trails, access roads and lifts on land that the prior alternatives had left as a woodland buffer between the old ski area and the proposed expansion area. These are substantial changes from the previously-discussed alternatives, not mere modifications "within the spectrum" of those prior alternatives. It would be one thing if the Forest Service had adopted a new alternative that was actually within the range of previously considered alternatives, *e.g.*, simply reducing the scale of every relevant particular. It is quite another thing to adopt a proposal that is configured differently, in which case public commenters might have pointed out, if given the opportunity — and the Forest Service might have seriously considered — wholly new problems posed by the new configuration (even if some of the environmental problems present in the prior alternatives have been eliminated).

Nor can it be said that these changes are not "relevant to environmental concerns." They could very well have environmental impacts that the Forest Service has not yet considered, simply based on their more compact physical

location. Indeed, the RDEIS said the Forest Service had considered expansion alternatives such as "other configurations on the existing permit area," but these alternatives "were eliminated from detailed analysis because they were not reasonable or feasible alternatives." JA, vol. I, at 145-46. Moreover, the plan selected, Alternative 6 in the FEIS, would require that four million gallons more water be withdrawn annually for snowmaking, compared with the closest alternative among the five previously given detailed consideration. Whether or not viewed in the graphic terms described by plaintiff RESTORE — four million gallons annually is enough water "to create a lake the size of a football field more than eleven feet deep," RESTORE Brief at 33 — this change can be expected to have a significant enough effect on the environment that additional analysis through a supplemental EIS would be required. *Cf. Roosevelt Campobello*, 684 F.2d at 1055 (requiring a supplemental EIS to consider newly completed studies regarding the small risk of a major oil spill). We conclude, based on the record in this case, that Alternative 6 entails substantial changes from the previously proposed actions that are relevant to environmental concerns, and that the Forest Service did not present those changes to the public in its FEIS for review and comment. Accordingly, the Forest Service's failure to prepare a supplemental EIS was arbitrary and capricious.

VI. EXECUTIVE ORDER 11,990

Plaintiffs contend that the Forest Service's failure to adequately consider alternatives to the use of Loon Pond and failure to develop adequate mitigation measures violates Executive Order 11,990, as well as NEPA. The district court rejected this argument on essentially the same grounds as the NEPA argument.

On appeal, the government contends that the Executive Order is not enforceable, at least by private parties, because NEPA did not confer rule making authority on the President. Plaintiffs argue that the Executive Order is accorded the full force and effect of a statute or regulation, enforceable under the APA. We have not previously decided this precise issue, nor need we decide it now.

Even assuming that the Executive Order is enforceable under the APA, it does not apply to the circumstances of this case. The Executive Order states that federal agencies,

> to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use.

Exec. Order No. 11,990, § 2. There is no dispute that Loon Pond is a "wetland." The Forest Service, however, contends that the Loon Corp. expansion plan does not constitute "new construction." The Executive Order defines "new construction" to include "draining, dredging, channelizing, filling, diking, impounding, and related activities." *Id.*, § 7(b). Dubois claims that the use of Loon Pond as a source of water for snowmaking and the discharge of used water from the snowmaking pipes into Loon Pond constitute "draining" and "filling" within the meaning of § 7(b).

We agree with the Forest Service that the mere expansion

of a previously ongoing withdrawal of water from or addition of water to a reservoir ordinarily does not fall within the ambit of the Executive Order's "new construction" requirement.[23] This conclusion is dictated by the plain meaning of the phrase "new construction," which does not ordinarily encompass the mere expansion of an ongoing activity, unless that activity itself constituted "new construction." Likewise, in common usage, the words "draining" and "filling" generally refer to activities that eliminate a wetland to convert it to another use, not to the expansion of an activity that already adds water to or withdraws water from an existing pond. Our reading is buttressed by common sense: one would not ordinarily think, without more, that a federal agency operating a dam on federal land would be required, by the Executive Order, to issue notices and make findings every time water is added to or withdrawn from the dam (assuming that the dam has already met all legal requirements to begin operation).

Applying the foregoing analysis of the Executive Order to the record in the instant case, we conclude that the situation here is more akin to an expansion of ongoing activities than to "new construction." The town of Lincoln is already using Loon Pond as a source of town water. And Loon Corp. has been using the Pond as a source of water for snowmaking, to a depth of four to six feet on the average. It is true that the extent of this intrusion is less than would be the case under the proposed expansion. But plaintiffs did not challenge these currently-

23. It is conceivable, of course, that an expansion of an already existing activity *could* fall within the ambit of the Executive Order's "new construction" requirement. This could occur if the expansion effectuated a qualitative change in the nature of the activity, rather than a mere quantitative enlargement of that activity. On the record before us in the instant case, we cannot say that plaintiffs have demonstrated such a qualitative change.

existing intrusions, and they have not demonstrated a factual basis for their conclusion that there is something qualitatively "new" about the proposed drawdown. Thus, the proposed Loon Corp. expansion project — by drawing down a substantial additional amount of water from Loon Pond and refilling it with East Branch water or with acidic runoff — does not satisfy the definition of "new construction" within the meaning of Executive Order 11,990, even though it constitutes a major action with significant impact on the environment, triggering NEPA's EIS requirements.

VII. THE CLEAN WATER ACT ISSUES

The Clean Water Act (CWA) was "a bold and sweeping legislative initiative," *United States v. Commonwealth of P.R.*, 721 F.2d 832, 834 (1st Cir. 1983), enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). "This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word "integrity" . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.' " *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H. R. Rep. No. 92-911, at 76 91972)). In contrast to NEPA's focus on process, the CWA is substantive, focusing upon the "integrity of the Nation's Waters, not the permit process." *Massachusetts v. Watt*, 716 F.2d at 952 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. at 314).

The most important component of the Act is the requirement that an NPDES permit be obtained, *Commonwealth of P.R.*, 721 F.2d at 834; *see* 33 U.S.C. § 1342 (1994), which we discuss in Part VII(B), *infra*. In addition, the CWA requires states to adopt

water quality standards which protect against degradation of the physical, chemical, or biological attributes of the state's waters. 33 U.S.C. § 1251(a), 1313(d)(4)(B) (1994); 40 C.F.R. 131.12 (1995). This is discussed in Part VII(C), infra.[24] Before turning to the merits of these issues, however, we must first address the defendants' jurisdictional arguments.

A. Jurisdictional Issues

As a threshold matter, defendants argue that we need not address the merits of plaintiffs' claim that an NPDES permit was required, because the court lacks subject matter jurisdiction. Defendants argue that the NPDES permit issue is not properly raised because plaintiffs failed to provide notice of their intentions to sue Loon Corp.[25] Defendants contend that Section 505(b) of the CWA "prohibits citizen plaintiffs from filing [suit to enforce the CWA's NPDES permit requirement] until at least 60 days after they have provided notice of their intent to sue" to EPA, to the State in which the alleged violation occurred, and to "any alleged violator" of the standard, limitation, or order. Forest Service Brief at 37; *see* 33 U.S.C. § 1365 (b)(l) (1994). It is undisputed, however, that Dubois, the original plaintiff, did

24. The third major aspect of the CWA is the use of industry specific effluent standards to control the quality of effluent that can be attained using available pollution control technology. 33 U.S.C. § 1311, *et seq.* This aspect of the CWA is not in issue in this litigation.

25. The Forest Service also asserts that no claim can stand against it as a defendant because EPA regulations place the responsibility for obtaining an NPDES permit on the "operator" of a covered activity; the Forest Service is merely the owner of the land on which the activity takes place. This argument is unavailing: if an NPDES permit were required, as plaintiffs contend, then the Forest Service should not have granted a special use permit to Loon Corp. until the NPDES permit had been obtained.

provide notice to the Forest Service of his intent to sue. The Forest Service was the only defendant that he did sue; and he alleged only that the Forest Service, not Loon Corp., had violated federal statutes, including the CWA, in approving Loon Corp.'s expansion plan. The district court therefore had jurisdiction to hear Dubois' claim that the Forest Service had approved the project illegally by not ensuring that an NPDES permit was obtained. His properly raised NEPA claim subsumed the CWA claim.[26]

Thus, even if Loon Corp.'s lack of notice did deprive us of jurisdiction to hear Dubois' claim that the Forest Service violated the CWA by failing to require an NPDES permit before approving the special use permit, this would not remove the NPDES permit issue from the case.[27] Regardless of whether any of the remedies provided in the CWA would be available to

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26. Thereafter, Loon Corp. chose to intervene in the action in order to protect its business interests. When Loon Corp. voluntarily intervened in an ongoing action, it "step[ped] into the shoes" of the original defendants — who were properly before the court — insofar as the 60-day notice is concerned. *Kitlutsisti v. ARCO Alaska, Inc.*, 592 F. Supp. 832, 842 (D. Alaska 1984), *vacated as moot*, 782 F.2d 800 (9th Cir. 1986); *cf. E.H. Ashley & Co. v. Wells Fargo Alarm Servs.*, 907 F.2d 1274, 1277 (1st Cir. 1990) (When insurer, as subrogee, steps into shoes of insured, insurer "has no greater rights against a third party" than the insured had; insurer "was on constructive notice of the provisions of [insured's] contract [with third party] because it occupies the shoes of its insured.").

27. Nor is RESTORE precluded from pursuing its claims on the ground that it did not notify defendants of its intent to bring suit. RESTORE was an intervener, merely joining a suit that was already *in esse*; it did not bring a new suit. As such, RESTORE was not required to notify Loon Corp. of its intent to bring suit. We need look no further than the statutory language itself: "No action may be *commenced*" without the requisite notice. 33 U.S.C.

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Dubois in light of his asserted failure to provide proper notice of his intent to sue, this court would still have the authority and the obligation to decide, under NEPA, whether an NPDES permit is required in this case. *See Keating v. FERC*, 927 F.2d 616, 624 (D.C. Cir. 1991). This is because, as noted *supra*, NEPA requires the Forest Service to identify in its EIS all federal permits that the project needed in order to comply with applicable federal law. 40 C.F.R. § 1502.25(b). There is no question that plaintiffs have properly invoked the jurisdiction of this court, pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction), to challenge defendants' failure to comply with NEPA in this regard. For these reasons, we reject defendants' jurisdictional argument and turn to the merits.

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§ 1365(b). RESTORE did not "commence" this action; it intervened in an existing action. Moreover, the purpose of the notice requirement — to give the parties an opportunity to resolve the problem administratively or to settle the matter without resort to the courts, before the parties have assumed adversarial positions brought about by litigation — no longer applied at the time RESTORE intervened in the ongoing suit. Hence, the purpose of the notice requirement would not be served by applying it to an intervener like RESTORE.

Nor are we faced with the kind of equitable considerations discussed in *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989), in holding an original plaintiff strictly to the notice requirement. Unlike the original plaintiff, who has full control over when to file the suit, an intervener like RESTORE has no control over the timing of the initial action. Because this action was already being litigated on an expedited schedule, RESTORE could well have lost the opportunity to protect its interests if it had served a notice of intent to sue and then waited 60 days before intervening in the expedited case. The balance of equities here favors permitting RESTORE to pursue its claims.

B. NPDES Permit

Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant" into navigable waters from any "point source" without an NPDES permit. 33 U.S.C. § 1311(a) (1994). Plaintiffs argue that the Forest Service violated Section 301(a) by failing to obtain an NPDES permit before approving Loon's plan to remove water from the East Branch, use it to pressurize and prevent freezing in its snowmaking equipment, and then discharge the used water into Loon Pond. Section 301(a) prohibits the "discharge of any pollutant by any person" except as authorized pursuant to a permit issued under the Act. *Id.;* see 33 U.S.C. §§ 1342, 1344 (1994); *Commonwealth of P.R.*, 721 F.2d at 835. The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (1994). The definition of a "pollutant" includes "dredged spoil, solid waste, . . . sewage, garbage, . . . biological materials, . . . heat, . . . sand, . . . and agricultural waste." 33 U.S.C. § 1362(6) (1994). "Navigable waters" is defined as "the waters of the United States." 33 U.S.C. § 1362(7) (1994). The district court found and the parties agree that Loon Pond is a water of the United States, that the East Branch water discharged from Loon Corp.'s snowmaking pipes into Loon Pond is a pollutant within the meaning of the CWA,[28] and that the pipe discharging the water into Loon Pond is a point source. The question, then, is whether there is an "addition" of pollutants to Loon Pond when water containing pollutants is discharged from Loon Corp.'s snowmaking equipment into Loon Pond.

The district court answered this question in the negative.

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28. It contains at least the same pollutants that were present in the water from the East Branch before intake into the pipes.

The court reasoned that the intake water from the East Branch of the Pemigewasset River and the water in Loon Pond are all part of "a singular entity, '*the* waters of the United States,' " and therefore that "the bodies of water are not to be considered individually in this context." Memorandum and Order at 13. Because it interpreted the East Branch and Loon Pond to be part of the same "singular entity," the court concluded that the transfer of water from the East Branch into Loon Pond would not constitute an "addition" into the Pond, at least if the pipes added no new pollutants.[29] *Id.*

There is no basis in law or fact for the district court's "singular entity" theory. The error in the court's reasoning is highlighted by an analogy the court drew: it hypothesized a pond in which "we place a pipe . . . and we pump the pond water from the bottom to the surface. No one would reasonably contend that internal pumping causes an 'addition' of pollutants to the

29. This premise is a disputed issue. Plaintiffs argue that allowing the water from the East Branch to flow through the pipes before discharge into Loon Pond results in the addition of not insignificant amounts of oil and grease. Defendants dispute this, which ordinarily would result in a reversal of summary judgment on this issue. *See* Fed. R. Civ. P. 56(c). Defendants argue, however, that plaintiffs failed to raise this factual dispute before the agency in timely fashion, so it is not preserved for our review. Plaintiffs respond that they could not have raised this dispute prior to the publication of the FEIS because the Forest Service did not even collect the data regarding oil and grease until after issuing its decision (the ROD). We need not resolve this dispute; we hold *infra* that, even if the pipes add no new pollutants, the transfer of East Branch water through Loon Corp.'s privately owned pipes and its discharge into Loon Pond constitutes a point source discharge of at least some pollutants into the Pond, thereby requiring an NPDES permit. Upon remand, the parties are not foreclosed from presenting their factual disputes to the EPA if they decide to contest the issuance of that permit.

pond. Instead, we would consider the pumping to be a redistribution of pollutants from one part of the pond to another." *Id.* at 12. Such a situation is not at all analogous to the instant case. There is no barrier separating the water at the top of a pond from the water at the bottom of the same pond; chemicals, organisms, and even heat are able to pass from the top to the bottom or *vice versa,* at rates determined only by the laws of science.

In contrast, the transfer of water or its contents from the East Branch to Loon Pond would not occur naturally. This is more analogous to the example the district court gave from the opposite end of the spectrum: where water is added "from an external source" to the pond and an NPDES permit is required. *Id.* As in this converse example, the East Branch and Loon Pond are not the same body of water; the East Branch is indeed a source "external" to Loon Pond. We can take judicial notice that the Pemigewasset River was for years one of the most polluted rivers in New England, the repository for raw sewage from factories and towns. It emitted an overwhelming odor and was known to peel the paint off buildings located on its banks. Yet, under the district court's theory, even if such conditions still prevailed, a proposal to withdraw water from the Pemigewasset to discharge it into Loon Pond would be analogous to moving water from the top to the bottom of a single pond; it would not constitute an "addition" of pollutants "from an external source" because both the East Branch and Loon Pond are part of the "singular" waters of the United States.[30] The district court apparently would reach the same conclusion

30. Again, we leave to one side the possibility that additional pollutants, such as oil and grease, would be added when the water flowed through the system of pipes. If that were true, that alone would require an NPDES permit.

regardless of how polluted the Pemigewasset was or how pristine Loon Pond was. We do not believe Congress intended such an irrational result.

The district court's analysis also ignores the fact that water would pass through Loon Corp.'s privately owned pipes on its way from the East Branch to Loon Pond. Thus, nature would not regulate — and neither the Forest Service nor the court could know in advance — whether any pollutants would be added to the water as it passes through the pipes. The district court concluded that the East Branch water does not "lose[ ] its status as navigable waters" even if it is "commercially exploited," Memorandum and Order at 18, as long as Loon Corp. does not "plan[ ] to add any additional pollutants to the East Branch water that it intends to discharge into Loon Pond." *Id.* at 10. The court does not indicate whether anyone assures compliance with the "plan" that no pollutants be added during the commercial exploitation, or if so who makes that determination and how it is made, at a time when the project is still just a proposal and not yet a fait accompli. *Cf. Massachusetts v. Watt*, 716 F.2d at 952. The district court's analysis would apply equally if the water passed through a paper mill on its way to Loon Pond, instead of through snowmaking pipes. And the analysis is equally unpersuasive in either circumstance. Either way, the water leaves the domain of nature and is subject to private control rather than purely natural processes. As such, it has lost its status as waters of the United States.

Other courts have held that an NPDES permit is required before pollutants may be moved from one body of water of the United States to another. *See Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Committee to Save Mokelumne*

River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308-09 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 198 (1994). The Eleventh Circuit has held that such a permit is required in order to move dredge materials by a point source *within the same* water body. *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985).

Even the Forest Service does not support the district court's conclusion that mere transfers of water from one water body to another, without more, never result in an addition of pollutants to waters of the United States. The Forest Service recognizes that "[i]t is possible that water transferred between unrelated water bodies of different water quality would properly be regarded as losing its status as 'water [sic] of the United States,'" requiring a Section 402 permit. Forest Service Brief at 47. We agree. The Forest Service qualifies this insight, however. It argues that Loon Corp. "moves water between hydrologically connected water bodies containing water of like quality" which, therefore, does not "introduce pollutants 'from the outside world' into the receiving waters." *Id.* Accordingly, the Forest Service argues no permit is required. We disagree with the Forest Service's qualification.

First, there is nothing in the statute evincing a Congressional intent to distinguish between "unrelated" water bodies and related or "hydrologically connected" water bodies. The CWA simply addresses "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Nor is the purpose of the CWA served by means of such a distinction. If anything, the purpose would be better served by a distinction between *de minimis* transfers of water and transfers which add some not insignificant amount of pollutants to the transferee water body. But no such distinction appears in the statute, and

to imply one would thrust some agencies with no expertise on environmental issues into the role of deciding whether the CWA's environmental protections should even be considered.[31]

More compellingly, the Forest Service's "hydrological connectedness" proposal ignores a fundamental fact about water: the direction of flow. It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the Pond flows *down* and eventually empties into the River. But water from the East Branch certainly does not flow *uphill* into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water *from* the East Branch *to* Loon Pond is not an "addition" of water from one of the "waters of the United States" to another. We therefore reject the Forest Service's "hydrological connectedness" proposal.

Likewise, we reject its assertion, unsupported by the record, that in some general sense the two bodies of water are "of like quality." First, this is the kind of substantive question to which the EPA would apply its technical expertise in deciding whether to issue an NPDES permit and what conditions to attach to such a permit in order to protect water quality. It is not the kind of

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31. As discussed in Part VII(C), *infra*, in another context, the Forest Service argues that it is the EPA, not the Forest Service, that has the expertise and the congressional mandate to determine whether a proposed project meets state water quality standards. We agree. The availability of EPA to perform this task is another reason why an NPDES permit should be obtained before the Forest Service approves the Loon Corp. expansion plan. *See* note 32 and accompanying text, *infra*.

threshold question that the Forest Service or this court should address in deciding whether to subject the Loon Corp. expansion proposal to the NPDES permitting process.

Second, the Forest Service does not contest plaintiffs' assertion that there are at least some pollutants in the East Branch that do not exist naturally in Loon Pond. The Final EIS itself noted that the East Branch has been designated by the New Hampshire legislature as a Class B Waterway, a lower quality designation than the Class A quality rating of Loon Pond. JA, vol. II, FEIS at 91. The difference in classifications — the East Branch as a Class B waterway, Loon Pond as Class A — evinces a higher quality level for the Pond than for the River, and belies the Forest Service's assertion that the two bodies of water are "of like quality."

Even if the East Branch were rated in the same general class as Loon Pond (Class A), that would not mean the two bodies of water were identical in quality, such that an NPDES permit would be unnecessary. The East Branch contains different organisms than Loon Pond, *inter alia,* Giardia lambda. Loon Pond is also colder overall than the East Branch, and its lower depths are significantly colder. The two bodies of water also have different chemistries, especially the low level of phosphorus in Loon Pond, which affects its biological composition. Nor has the Forest Service argued that *all* such pollutants would be eliminated before any East Branch water would be pumped up to refill Loon Pond after depletion by Loon Corp.'s snowmaking. The Service cannot say, therefore, that the discharge of East Branch water into Loon Pond would not result in "any pollutants" being added to the Pond. 33 U.S.C. § 1362(12)(A).

Aside from the difficulty of defining a general concept such

as "of like quality," it would defeat the purpose of the CWA's permit process to interpret the statutory language "discharge of *any* pollutant," 33 U.S.C. § 1311(a), to be implicitly qualified by the phrase "except when the transferee body of water is of like quality." The Forest Service is simply wrong to analogize the present situation to a dam that merely accumulates the *same* water, *see National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982), or a pump storage facility that stores water from one source in a different place, *see National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 589-90 (6th Cir. 1988), as distinguished from moving different water from one flowing water body into another stationary, colder body. We cannot allow such a watering down of Congress' clear statutory protections.

We hold that the Pemigewasset River and Loon Pond are two distinct "waters of the United States," and that the proposed transfer of water from one to the other constitutes an "addition." Where, as is undisputed here, the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required. The Forest Service's determination to the contrary was arbitrary and capricious and not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

C. Violation of State Water Quality Standards

Plaintiff Dubois claims that state water quality standards are violated because of the quality of water that would enter Loon Pond. This water would come from one of two sources: some of it would come from snowmelt that replaces the water that Loon Corp. has pumped out of Loon Pond to make snow; and some would be water that Loon Corp. has taken from the East Branch for snowmaking and then discharged into Loon Pond. Dubois contends that Loon Corp.'s snowmaking

operations pose an impermissible threat to Loon Pond because influxes of East Branch water and snowmelt — the two principal sources of water to refill the Pond — could alter the Pond's naturally occurring pH, bacteria, oil and grease, and turbidity levels.

On the merits of the water quality standards issue, Dubois argues that the CWA requires states to adopt water quality standards which protect against degradation of the physical, chemical, or biological attributes of the state's waters. 33 U.S.C. §§ 1251(a), 1313(d)(4)(B); 40 C.F.R. § 131.12. The greatest protection is afforded to Outstanding Resource Waters, including Loon Pond, as to which no degradation is permitted. 40 C.F.R. § 131.12(a)(3); N.H. Code Admin. R. Env. Ws 437.06. Dubois contends that the ski resort's proposal to draw down a significant amount of water changes the physical structure of Loon Pond; that refilling it with East Branch water containing phosphorus (and through pipes that might contain oil and grease) or with acidic runoff would change the Pond's chemical composition; and that the transfer of organisms such as Giardia lambi and chemicals such as phosphorus into the Pond would alter its biological attributes. Because we hold *infra* that Dubois cannot, in a challenge to the Forest Service's FEIS, collaterally attack the state's certification of compliance with state water quality standards, we need not reach the merits of the state water quality standards issue.

Defendants argued in the district court that Dubois' CWA claim was not properly presented, that Dubois should have raised his objections by exhausting various administrative remedies and filing a timely appeal in the New Hampshire Supreme Court. They argued that the federal agency (Forest Service) and the federal court lack the authority to review independently and determine the validity of requirements imposed under state law or in a state's § 401 certification, *see* 33 U.S.C. § 1371(c)(2)(A)

(1994), and that such authority is expressly delegated to the states, 33 U.S.C. § 1341(a) (1994).

The district court agreed. It held that, "[i]f the plaintiffs in this case were dissatisfied with the state's § 1341 certification, they could have challenged the certification by exhausting state administrative remedies and filing a timely challenge in the New Hampshire Supreme Court." Memorandum and Order at 21-23. That is true insofar as it goes. The question, however, is whether a state court action is the plaintiffs' *only* recourse, or whether, in the alternative, they had a right to challenge in federal court the federal agency's issuance of a federal permit in reliance on the state certification, where the basis for their challenge is that the project fails to meet the minimum standards of the federal Clean Water Act.

Defendants may be correct that the cases they rely upon hold that the state courts are the only fora in which to challenge whatever requirements the state *adds, beyond* the minimum required by the CWA. Those cases do not, however, deprive the federal courts of jurisdiction to hear a claim that defendants have violated the *floor* level of clean water requirements imposed by the CWA, *i.e.*, the requirements which the state regulations *share* with the federal CWA.

The cases relied upon by the defendants and by the district court[32] dealt with challenges to the state's imposition of *more stringent* controls on a project's water pollution effluent. Such

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32. They rely particularly on our *Roosevelt Campobello* decision, 684 F.2d at 1056, but also on *Puerto Rico Sun Oil*, 8 F.3d at 81; *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Cores of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D.Pa. 1981), *aff'd mem.*, 707 F.2d 1392 (3d Cir.), *cert denied*,

(Cont'd)

cases relied on the language of the CWA itself, as well as basic principles of federalism, to support their holdings that the CWA "empower[s]" the states "to set more stringent water quality standards than those set by the Act and its attendent requirements" to prevent water pollution. *Marathon Dev. Corp.*, 867 F.2d at 99; *see Commonwealth of P.R.*, 721 F.2d at 834 n. 3; *Roosevelt Campobello* 684 F.2d at 1056. However, the states may not set standards that are less stringent than the CWA's. *See Marathon Dev. Corp.*, 867 F.2d at 99. Simply put, the CWA provides a federal floor, not a ceiling, on environmental protection. If a state seeks to approve a standard that is less stringent than the federal CWA's floor, or seeks to apply a standard in a way that is otherwise invalid under *federal* law, then federal agencies and federal courts are obligated to resolve the application of the federal CWA in any case that properly comes before them. *See Keating v. FERC*, 927 F.2d at 624.

The Forest Service asserts another defense, also relied on by the district court, which carries more force. Section 511(c)(2)(A) of the CWA precludes federal agencies from invoking NEPA to authorize their review of "the adequacy of any certification under section [401]." 33 U.S.C. § 1371(c)(2)(A). Dubois points out that, in the circumstances of this case, Section 511(c)(2)(A) does not apply when the discharge of pollutants in question is not regulated by effluent limitations established under CWA Sections 301(b) and 302, 33 U.S.C. § 1311(b) & 1312, or by an applicable standard of performance under CWA Sections 306 and 307, 33 U.S.C. §§ 1316 & 1317. Dubois Brief at 27; *see* 33 U.S.C. § 1341(a). Such effluent limitations and standards are established in NPDES

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464 U.S. 915 (1983). All of these cases involved states imposing more stringent controls on water pollution than required by federal law.

permits for point source dischargers. 33 U.S.C. §§ 1311(b), 1312, 1316, 1317, 1362(11). Dubois then tries to bootstrap the fact that the Forest Service failed to apply for an NPDES permit into a circumstance that renders Section 511(c)(2)(A) inapplicable. Dubois Brief at 27-28. His argument is without merit.

It is true that the Forest Service was obligated to obtain an NPDES permit before permitting Loon Corp. to expand its ski resort. *See* Part VII(B), *supra*. However, the violation of that statutory obligation is a separate issue from the state water quality standards issue. For purposes of the latter, the fact is that there do not exist any effluent limitations under CWA Sections 301(b) or 302 nor any standards of performance under CWA Sections 306 or 307 that apply to the discharge of East Branch water and pollutants into Loon Pond. Therefore, whether or not the Forest Service actually obtained the required NPDES permit, Section 511(c)(2)(A) applies, and Dubois' challenge to the adequacy of the state's Section 401 certification may not proceed in this court.

As the federal defendants argued in their brief and as we held in *Roosevelt Campobello*, 684 F.2d at 1056, Dubois' challenge must be addressed as part of EPA's "independent obligation to ensure that EPA-issued NPDES permits meet state water quality standards." Forest Service Brief at 29; *see* 33 U.S.C. § 1311(b)(1)(C) (1994).[33] If, upon remand, EPA

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33. The availability of EPA to perform this task is another reason supporting our holding in Part VII(B), *supra*, that an NPDES permit is required. *See supra*, note 30. The federal CWA requires that any state certification ensure that the minimal federal standards have been adhered to. The government is correct that the Forest Service possesses neither the

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determines that a permit is appropriate, with or without conditions or limitations, [34] and if plaintiffs disagree with EPA's decision, then they may challenge such decision in any manner that is available to them at the time. But EPA, not the Forest Service, is the proper entity to evaluate compliance with state water quality standards.

CONCLUSION

We affirm the district court's denial of defendant Loon's motion to dismiss plaintiff Dubois' complaint for failure to meet his burden of establishing his standing to sue.

We reverse the district court's grant of summary judgment in favor of defendants and reverse the district court's denial of summary judgment in favor of plaintiffs, with respect to

(1) the NEPA/EIS issue relating to consideration of alternatives,

(2) the supplemental EIS issue, and

(3) the NPDES permit issue.

(Cont'd)

congressional mandate nor the expertise to second-guess state water quality certifications. But EPA does; and the CWA envisions that EPA make those assurances in the context of deciding whether to issue an NPDES permit.

34. Whether or not the NHDES certifies that state water quality standards have been met, EPA would be "bound to include in the federal permit 'any more stringent limitations . . . established pursuant to any State law or regulations (under authority preserved by section 510).'" *Roosevelt Campobello*, 684 F.2d at 1056 (quoting 33 U.S.C. § 1311(b)(1)(C)).

Appendix A

We affirm the district court's grant of summary judgment in favor of defendants and affirm the district court's denial of summary judgment in favor of plaintiff Dubois, with respect to the alleged violations of

(1) Executive Order 11,990, and

(2) state water quality standards under the CWA.

Affirmed in part; reversed in part; remanded; costs on appeal awarded to plaintiffs.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED FEBRUARY 13, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 96-1015
96-1068

ROLAND C. DUBOIS and RESTORE: THE NORTH WOODS,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., and LOON MOUNTAIN RECREATION CORPORATION,

Defendants, Appellees.

ORDER OF COURT

Entered: February 13, 1997

1. The petition for rehearing by Defendant-Appellee Loon Mountain is denied.

2. In response to Defendant-Appellee United States Department of Agriculture's petition for rehearing the following changes will be made in the opinion:

> (a) On page 53, footnote 25, delete the last sentence and substitute therefor the following:

> This argument is unavailing: if an NPDES permit were required, as plaintiffs contend, then the Forest Service should not have granted a special use permit to Loon Corp. without ensuring that Loon Corp. obtain the NPDES permit.

(b) On page 70, line 3, substitute the words "Loon Corp." for the words "the Forest Service";

(c) On page 70 delete the first sentence of the paragraph beginning on line 6 and substitute therefor the following:

> It is true that the Forest Service was obligated to assure itself that an NPDES permit was obtained before permitting Loon Corp. to expand its ski resort.

3. In light of this order we do not think Appellant Dubois' petition for a limited rehearing requires any response.

By the Court:

s/ William H. Ng
Clerk.

[ccMessrs: Dubois, Kruse, Kehne, Slavitt, Kidd, Bryson, Callen, Plourde, Armstrong, Hogan, Ms"s Williams, Quast, Hill]

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED NOVEMBER 23, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 95-50-B

Roland C. Dubois, et al.

v.

U. S. Department of Agriculture, et al.

MEMORANDUM AND ORDER

Loon Mountain Recreation Corporation ("Loon") operates a ski area in northern New Hampshire. Because part of the ski area is located in the White Mountain National Forest, Loon's operations require a special use permit issued by the United States Forest Services. 16 U.S.C.A. § 497(b) (West Supp. 1995). In 1986, Loon asked the Forest Service to amend the permit to allow it to expand. After several years of review, the Forest Service issued a Record of Decision ("ROD") in 1993, approving a revised version of Loon's expansion plan.

Plaintiff Roland Dubois filed this action seeking to compel the Forest Service to revoke any permits and approvals issued under the ROD and to enjoin Loon from proceeding with its expansion plan. Dubois has been joined in his claims by intervenor RESTORE: The North Woods ("RESTORE"), an environmental organization. Plaintiffs' principle contentions are that: (1) the ROD violates the Clean Water Act ("CWA") because

it would permit Loon to discharge water from the East Branch of the Pemigewasset river into Loon Pond without a National Pollutant Discharge Elimination System ("NPDES") permit, *see* 33 U.S.C.A. §§ 1311(a), 1342(a) (West 1986 & Supp. 1995); (2) Loon's proposed use of Loon Pond violates water quality standards established by the State of New Hampshire pursuant to the CWA, *see* N.H. Code Admin. R. Env-Ws 430-440 (1991); and (3) the Forest Service violated the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. § 4332 (West 1994), in preparing the Environmental Impact Statement ("EIS") for the project. The matter is before me on the parties' cross-motions for summary judgment.[1]

I. BACKGROUND

The Forest Service announced Loon's request to amend its special use permit in January 1987. Loon originally proposed

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1. Loon has moved to dismiss claiming that plaintiffs lack standing. Although standing presents a question of jurisdiction that ordinarily must be addressed before moving to a case's merits. I need not determine the standing of all of the plaintiffs if at least one plaintiff has stnading to maintain each claim. *Washington Legal Foundation v. Massachusetts Bar Found.*, 993 F.2d 962, 971-72 (1st Cir. 1993). In this case, RESTORE alleges that its members who live and work in the vicinity of the ski area will be harmed by the proposed expansion. It supports these allegations with affidavits from members who claim that they live in the town where Loon is located, use the town's water supply system, which relies in part on Loon Pond as a water source, and make regular recreational use of the area in which the expansion will occur. They also allege that they will be directly affected by "noise, water quality, taxes, conversion of forested areas, impacts of wildlife and a degradation of the visual quality of the town if Loon is allowed to expand." In light of these affidavits, RESTORE has standing *Conner*, 115 S. Ct. 2293 (1995); *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 885-89 (1990); *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992). Accordingly, I deny Loon's motion to dismiss.

to expand onto an additional 930 acres of the White Mountain National Forest. Because of the project's scope, the Forest Service determined in January 1988 that it would prepare an EIS before acting on Loon's request. Thereafter, the Forest Service entered into a memorandum of understanding with representatives of various federal, state, and local agencies to form a Joint Review Committee to review the public's comments and recommendations during the EIS process.[2] The Forest Service also hired a contractor to prepare the EIS working under the Forest Service's direction but at Loon's expense.

In February 1989, the Forest Service released a Draft EIS ("DEIS") that discussed three alternative development plans in detail after eliminating other suggested alternatives. Loon's proposal was to expand in two phases. During the first phase, Loon proposed to construct three new lifts, thirteen new trails, an up-mountain lodge on Forest Service land, and a new snowmaking system that would significantly increase the ski area's use of Loon Pond as a water source. During the second phase, Loon proposed to construct four more lifts and sixteen additional trails. Other developments would also occur on adjacent private lands during both phases of the project. The other two alternatives studied in detail were no action and a limited development alternative implementing only the first

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2. The "formal" members of the committee were: North Country Council; Town of Lincoln; New Hampshire Council on Resources and Development; United States Environmental Protection Agency, Region I; United States Fish and Wildlife Service; Loon Mountain recreation Corporation; Lakes Region Planning Commission; and White Mountain National Forest. The "informal" members of the committee included national groups such as the Sierra Club; state environmental groups such as the Society for the Protection of New Hampshire Forests; New Hampshire administrative agencies; the Town of Plymouth; and the Lincoln-Woodstock Chamber of Commerce.

phase of Loon's proposal. The Forest Service issued a Supplement to the DEIS in November 1989 to respond to concerns arising from the unusually low water levels observed in the East Branch during the previous winter.

In January 1991, the Forest Service replaced the DEIS with a Revised DEIS ("RDEIS"). The RDEIS covered the same topics but added new information about alternatives and about the project's cumulative impacts. The RDEIS identified five alternatives: (1) no action; (2) Loon's proposal; (3) limited development implementing only the first phase of Loon's proposal with additional limitations on water withdrawals for snowmaking; (4) limited development with a smaller permit area of 320 acres; and (5) limited expansion within the existing permit area.

After another period of public comment, the Forest Service released a Final EIS ("FEIS") in November 1992. The FEIS included a new alternative that, in the words of the Forest Service, "consolidates and refines elements of all the other five alternatives." The sixth alternative would allow Loon to improve its existing facilities and expand onto 581 acres of additional Forest Service land. In the existing permit area, Loon would widen established trails, add several new trails and one new lift, and improve existing lifts and restaurant facilities. In the new permit area, Loon would add a new lift and nine new trails. A new base lodge and an additional parking lot would be constructed on private land at the base of the new lift.

The sixth alternative would also allow Loon to significantly expand its existing snowmaking system. Over time, Loon would install new snowmaking pipes and extend snowmaking to all trails, both in the existing permit area, and in the new permit area. Although Loon would continue to use the East Branch,

Boyle Brook, and Loon Pond as water sources for its snowmaking operations, Loon Pond would become its principle water source. Under this alternative, Loon would be permitted to draw the pond down by as much as fifteen feet for snowmaking, and the Town of Lincoln, which uses the pond as a source for drinking water, would be permitted to draw the pond down by as much as five additional feet. As a mitigation measure, Loon would be required to refill the pond by May first of each year with water pumped though its snowmaking system from the East Branch. The alternative would also impose other restraints on Loon's use of water from the East Branch and Loon Pond.

The Forest Service issued its ROD approving Loon's permit application on March 1, 1993. The decision authorizes "an expansion of the ski area both within the existing permit area and into an adjacent area of National Forest System lands known as South Mountain . . . as described in Alternative 6 in the Final EIS and later in the [ROD]." Plaintiffs commenced this action after exhausting administrative remedies.

II. DISCUSSION

A. *The Summary Judgment Standard*

It is axiomatic that a court does not find facts in ruling on a motion for summary judgment. Instead, the court construes the evidence in the light most favorable to the nonmovant and determines whether the moving party is entitled to judgment as a matter of law. *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). Less well understood is the effect that the burden of proof frequently has on the resolution of summary judgment motions.

If the party moving for summary judgment has the burden of proof at trial, the court will grant the motion only if: (1) the moving party initially produces enough supportive evidence to entitle the movant to judgment as a matter of law (i.e., no reasonable jury could find otherwise even when construing the evidence in the light most favorable to the nonmovant), and (2) the nonmovant fails to produce sufficient responsive evidence to raise a genuine dispute as to any material fact. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-17 (11th Cir. 1993). By contrast, if the nonmovant bears the burden of proof, the court will grant the motion if; (1) the movant alleges that the nonmovant lacks sufficient proof to support one or more elements of her case, and (2) the nonmovant is unable to produce sufficient responsive evidence to withstand a motion for judgment as a matter of law. *Id.; see also, Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 504 U.S. 985, (1992). Thus, the amount and quality of the responsive evidence that the nonmovant must produce to successfully resist a motion for summary judgment will depend upon whether the nonmovant bears the burden of proof at trial. *Fitzpatrick*, 2 F.3d at 1115-17. Of course, if the parties agree on the material facts, the issues presented concern pure questions of law which can be resolved without regard to the burden of proof.

With these standards in mind, I turn to the merits of the cross-motions for summary judgment.

B. *Clean Water Act Claim*

Plaintiffs argue that the Forest Service violated the CWA by allowing Loon to discharge East Branch water into Loon Pond without an NPDES permit.[3]

3. One of the EPA's CWA regulations states that the operator rather

(Cont'd)

Appendix C

The CWA was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (West Supp. 1995). In pursuit of this broad goal, the CWA assigns distinct enforcement roles to federal and state governments. *PUD No. 1 v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1905 (1994). The federal government is responsible for establishing and enforcing standards for certain "point source"[4] discharges under the NPDES permit program. *See* 33 U.S.C.A. §§ 1311, 1314 (West 1986 & Supp. 1995). The states, subject to federal approval, are required to develop and administer broad water quality and antidegradation standards that are intended to comprehensively address the adverse water quality effects of both point, and non-point sources. *Id.* at § 1313.

The CWA specifies that an NPDES permit is required for any action that will result in "the discharge of any pollutant." 33 U.S.C.A. §§ 1311(a), 1342(a). In the context of the present case, this phrase is defined in pertinent part as "any addition of any pollutant to navigable waters from any point source." *Id.* at

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(Cont'd)

than the owner of a discharge facility must obtain any required NPDES permit. 40 C.F.R. § 122.21(b) (1994). The Forest Service relies on this regulation in asserting that it cannot be held liable for failing to require Loon to obtain an NPDES permit even if Loon, as the discharger, is obligated to obtain a permit. Since I determine that plaintiffs' CWA claim lacks merit, I need not address the Forest Service's argument.

4. The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C.A. § 1362(14) (West Supp. 1995).

§ 1362(12). Plaintiffs and the Forest Service agree that: (1) both the East Branch and Loon Pond are "navigable waters"; (2) the East Branch, like all navigable waters, meets the CWA's definition of "pollutant";[5] and (3) the release of East Branch water into Loon Pond through Loon's snowmaking equipment will come "from" a "point source." Moreover, the record contains no evidence suggesting that Loon plans to add any additional pollutants to the East Branch water that it intends to discharge into Loon Pond. Thus, the parties' disagreement about whether Loon needs an NPDES permit centers on whether the discharge of East Branch water into Loon Pond will result in "any addition" of pollutants to the "navigable waters."

In resolving this statutory construction question, I begin by examining the disputed text in the context in which it appears. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987). If the disputed language can have only one plausible meaning, I ordinarily will proceed no further. *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). However, if the text is ambiguous, it may be appropriate to look to extrinsic sources to aid my analysis. *Cf. Shannon v. United States*, 114 S. Ct. 2419, 2426 (1994) (noting Justices' differing views concerning the usefulness of legislative history in statutory construction). Alternatively, I may be required to follow one of several default rules that require the resolution of ambiguities in a particular way. *See, e.g., Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984) (court should defer to

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5. The CWA defines pollutant broadly to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C.A. § 1362(6) (West 1986).

agency's reasonable interpretation of ambiguous statute within the agency's regulatory domain).

Although the parties suggest that their disagreement concerns the meaning of "addition," it really hinges on the meaning of "navigable waters." "Addition" is not defined in the CWA. However, it is commonly understood to mean the act of combining one thing with another in a way that results in an increase in what was originally there. *See Random House Unabridged Dictionary* 22-23 (2d ed. 1987). To illustrate the point, say we have a pond containing pollutants and we release water containing pollutants from an external source into the navigable waters and the discharge will not increase pollutants in the navigable waters as a whole. Plaintiffs disagree and instead contend that the statutory reference to navigable waters should be deemed to refer to specific bodies of navigable water. Thus, they argue that releasing East Branch water into Loon Pond constitutes an addition of pollutants into navigable waters because the East Branch and Loon Pond are each separate navigable bodies of water and East Branch water contains pollutants.

The principal flaw in plaintiffs' argument is that it is incompatible with the text they rely on to support their claim. The CWA specifies that an NPDES permit is required only if a discharger adds pollutants to "navigable waters." 33 U.S.C.A. § 1362(12). "Navigable waters" is defined as "*the* waters of the United States including territorial seas." *Id.* at § 1362(7) (emphasis added). The definition of "navigable waters" as a singular entity, "*the* waters of the United States," explains that the bodies of water are not to be considered individually in this context. This use of a definition of "navigable waters" that does not differentiate among separate water bodies can only be

understood to refer to "navigable waters" in a *collective* sense. Because plaintiffs' interpretation is incompatible with the text's plain meaning, I must reject it unless this case presents one of the "rare and exceptional circumstances" in which a contrary legislative intent is clearly expressed. *Ardestani*, 502 U.S. at 135 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Plaintiffs have not identified anything in the CWA's legislative history to support their interpretation, and the cases they rely on are unhelpful. In *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, the court determined that the defendants needed an NPDES permit to release water discharged from a reservoir through a point source into the navigable waters because the defendants used the reservoir to collect runoff containing pollutants from its mining operations. 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied sub nom., Members of the Cal. Regional Water Quality Control v. Committee to Save the Mokelumne River*, 115 S. Ct. 198 (1994); *see also West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276 (S.D.W.Va. 1989) (mine runoff), *aff'd without op.*, 932 F.2d 964 (4th Cir. 1991). Similarly, in *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (2d Cir. 1991), *rev'd, in part, on other grounds*, 505 U.S. 557 (1992), the court held that the defendant needed an NPDES permit to release water through a culvert into a marshy area because the defendant was releasing pollutants from its landfill into the water passing through the culvert. *Id.* In each case, the court properly concluded that the discharger needed an NPDES permit, because the discharge added pollutants to the navigable waters from an external source. *See National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (no addition unless pollutants are added from an external source); *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

Plaintiffs also argue that I must defer to what they contend is the EPA's contrary interpretation of "navigable waters." I reject this argument for two reasons. First, while I will defer to reasonable agency interpretations of ambiguous statutes, such deference is unwarranted in cases such as this where the statute's meaning is plain. *Chevron,* 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Norfolk & W.R. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117 (1991). Second, the EPA statement plaintiffs rely on does not support their interpretation. The statement is contained in a "Supplementary Information Document" the EPA issued in March 1995 in connection with the development of water quality rules for the Great Lakes System. The document provides, in pertinent part, that:

> EPA believes that the pivotal fact for determining whether an addition has taken place for purposes of Section 402 of the CWA is simply whether a pollutant is physically moved from outside of the waterbody into the waterbody by the discharger via a point source. In EPA's view, the appropriate analytical scope for answering this question need go no further than the end of a facility's discharge pipe. If, immediately prior the discharge activity, the pollutant was not contained in waters of the United States, then the release of the pollutant into the waterbody is quite logically an "addition" of that pollutant to the waterbody.

Water Quality Guidance for the Great Lake System;

Supplementary Information Document (SID) at 355 (March 1995). Notwithstanding plaintiffs' contrary argument, this statement merely describes the EPA's position that the addition of water containing pollutants from outside the waters of the United States into those waters qualifies as an addition of pollutants regardless of whether the water was once part of the waters of the United States. It in no way supports plaintiffs' different contention that the transfer of water from one body of water into another adds pollutants to the navigable waters.

Plaintiffs next argue that water drawn into Loon's pumping and snowmaking system loses its status as part of the navigable waters. Therefore, they contend, subsequent discharges of the water from the snowmaking system into Loon Pond adds pollutants to the navigable waters from an external source. This argment is based on two related contentions. First, plaintiffs contend that water cannot be part of the navigable waters when it is rendered non-navigable by being confined in Loon's snowmaking pipes. Second, they argue that water loses its status as part of the navigable waters when Loon uses it to operate its snowmaking system. For the reasons I describe below, neither contention is persuasive.

To the extent that plaintiffs base their argument on the assumption that water cannot be part of the navigable waters unless it is actually navigable, their argument is inconsistent with both the text of the CWA and Supreme Court precedent. As I previously noted, the term "navigable waters" is defined broadly as "the waters of the United States." Thus, the statutory definition does not restrict the term's scope in the manner plaintiffs suggest. More importantly, plaintiffs' argument is foreclosed by the Supreme Court's opinion in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985), which

acknowledges that water need not be actually navigable to qualify as part of the navigable waters under the CWA.

Plaintiffs' argument that water loses its status as part of the navigable waters if it is commercially exploited fairs no better. The CWA's definition of navigable waters contains no such limitation and the EPA's regulations implementing the CWA define "waters of the United States" to include any water from "intrastate lakes, rivers, streams . . . [w]hich are used or could be used for industrial purposes by industries in interstate commerce." 40 C.F.R. § 122.21 (1994). Thus, the defining regulation contradicts plaintiffs' argument as it expressly provides that water does not lose its status as waters of the United States simply because it is exploited for a commercial purpose.

Plaintiffs argue that the EPA has taken a position contrary to the one expressed in 40 C.F.R. § 122.21 on at least one prior occasion. Plaintiffs point to a portion of the proposed regulations the EPA issued concerning water quality standards for the Great Lakes System in which the agency stated "[o]nce water is removed for use in industrial operations, it has lost its character as waters of the United States and the discharge must be governed by appropriate conditions in an NPDES permit." 58 Fed. Reg. 20802, 20956 (proposed April 16, 1993). While the EPA statement supports plaintiffs' interpretation, it was not incorporated in the EPA's final regulations on the subject.[6] 60 Fed. Reg. 15366 (1995) (amending 40 C.F.R. Parts 9, 122, 123,

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6. The Supplementary information Document issued in connection with the EPA's rulemaking on the issue reaffirms the EPA's position that the release of intake water into the navigable waters adds pollutants to those waters if the intake water was not part of the waters of the United States immediately prior to the discharge. It does not, however, discuss the EPA's statement in the proposed regulations that intake water loses its status as part of the navigable waters if it is commercially exploited. SID at 355.

131 and adding 132). Moreover, the EPA's current position in this case is that Loon's use of East Branch water will not require an NPDES permit. Letter from John P. DeVillars, Regional Administrator, EPA, to New Hampshire Congressional Delegation, et al. (May 5, 1995). Under these circumstances, I decline to adopt an interpretation of "navigable waters" that is inconsistent with both the text or the statute itself and the EPA's regulations interpreting the statute.[7]

In summary, since the East Branch water drawn into Loon's snowmaking system retains its status as navigable waters and Loon will not add pollutants to those waters, its subsequent release of East Branch water into Loon Pond adds no pollutants to the navigable waters within the meaning of the CWA. Therefore, Loon is not required to obtain an NPDES permit to discharge East Branch water into Loon Pond.

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7. Plaintiffs also rely on *dicta* in the Sixth Circuit's opinion in *Consumers Power.* Although the *Consumers Power* court did state that water that is diverted by industrial operations for cooling purposes loses its status as part of the waters of the United States, the example chosen by the Court to illustrate this point involved the addition of pollutants to the intake water by the discharger. 863 F.2d at 589. In the present case, there is no evidence that Loon will add pollutants to the East Branch water it will discharge into Loon Pond. Thus, the facts of this case are distinguishable from the *dicta* in *Consumers Power.* Finally, plaintiffs' citation to *United States v. Law,* 979 F.2d 977, (4th Cir. 1992), *cert. denied,* 113 S. Ct. 1844 (1993), is also unpersuasive. In *Law,* the discharger operated a water treatment system. EPA regulations expressly provide that water drawn into such systems ceases to be part of the waters of the United States. 40 C.F.R. § 122.21. Thus, while the court correctly determined in *Law* that the release of intake water containing pollutants from a water treatment system adds pollutants to the navigable waters, that case does not in any way support the plaintiffs' argument that a similar result is required here.

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C. *State Antidegradation and Water Quality Standards Claim.*

Plaintiffs next argue that Loon's proposed use of Loon Pond will violate New Hampshire's Antidegradation and Water Quality standards.[8]

When, as in this case, an applicant for a federal permit proposes to undertake an activity that "may result in any discharge into the navigable waters," the CWA requires the applicant to obtain certification from state authorities that the proposed activity will not violate state water quality standards. 33 U.S.C.A. § 1341(a)(1). Although the Forest Service obtained the required state certification, plaintiffs apparently contend that the certification was improperly granted and, therefore, the Forest Service violated the Administrative Procedures Act ("APA") by accepting the certification.[9]

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8. Loon Pond qualifies as an "outstanding resource water" under New Hampshire's antidegradation regulations. N.H. Code Admin. R. Env-Ws 437.06(a) (1991). These regulations prohibit "[n]ew or increased discharges of pollutants to such waters are prohibited unless the petitioner can prove to the division, in accord with the state's antidegradation implementation policy, that the discharge is for the express purpose and intent of maintaining or enhancing the water resource and its beneficial use." *Id.* at 437.06(b). Plaintiffs argue that Loon's plan will violate this regulation by adding pollutants to Loon Pond. They also argue that the plan will violate the state's water quality standards for grease, phosphorous, turbidity, and pH. *See id.* at 432.03.

9. Plaintiffs concede that they cannot base their water quality standards claim on the CWA's citizen suit provision. *See Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842, 859 (9th Cir. 1987). Instead, they contend that the Forest Service's acceptance of an erroneous state certification violates the APA because it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (West 1977).

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The fatal flaw in the plaintiffs' argument is that it is based on the incorrect assumption that the Forest Service must independently determine whether the proposed activity will comply with state water quality requirements. The CWA expressly delegates to the states the duty to determine whether a proposed activity will violate state water quality standards. 33 U.S.C.A. § 1341(a). Moreover, the CWA specifies that a federal permitting authority is not authorized by NEPA to review "the adequacy of any certification under section 1341." 33 U.S.C.A. § 1371(c)(2)(A) (West 1986). Relying on these provisions, the First Circuit has determined that "federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's [§ 1341] certification." *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *see also, New England Coalition v. United States Nuclear Regulatory Comm'n*, 582 F.2d 87, 98-99 (1st Cir. 1978) (NRC need not independently review the EPA's CWA determinations when licensing a nuclear power plant). If the plaintiffs in this case were dissatisfied with the state's § 1341 certification, they could have challenged the certification by exhausting state administrative remedies and filing a timely challenge in the New Hampshire Supreme Court. *See* N.H. Code Admin. R. Env-Ws 415.14 (1991) ("Any person aggrieved by a final decision of the division on application pursuant to these rules may appeal the decision to the water supply and pollution control council pursuant to RSA 21-0:14."); N.H. Rev. Stat. Ann. § 21-0:14 (1988 & Supp. 1994) (providing that aggrieved persons may appeal decisions of the council to state court pursuant to N.H. Rev. Stat. Ann. § 541); N.H. Rev. Stat. Ann. § 541:6 (1974) (authorizing aggrieved party to appeal to the New Hampshire Supreme Court within thirty days after a petition for rehearing is denied or a decision following a rehearing). However, they

are not entitled to circumvent these procedures by raising their claim for the first time in federal court.

D. *National Environmental Policy Act Claims*

Plaintiffs also challenge the adequacy of the FEIS and the process by which it was prepared. Specfically, they argue that the Forest Service violated NEPA because the FEIS does not adequately: (1) identify and discuss alternatives to the proposed action; (2) describe the environment that would be affected by the proposed action; (3) consider the proposed action's environmental impact; and (4) respond to public comments concerning the proposed action. They also contend that the Forest Service violated NEPA by failing to provide notice and an opportunity for public comment on the selected alternative and by violating an executive order barring any federal assistance for new construction in wetlands areas unless the agency involved determines that there are no practicable alternatives to the proposed action. Before discussing the merits of these claims, I review NEPA's relevant requirements and the standard of review that guides my analysis.

NEPA establishes certain "action forcing" procedures that were designed to insure that agency decisionmakers collect, analyze, and disseminate to the public detailed information concerning the environmental impact of proposed actions. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). Specifically, NEPA requires that proposals for major federal actions significantly affecting the quality of the human environment must be accompanied by an EIS containing a "detailed statement" describing:

(i) the environmental impact of the proposed

> action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C.A. § 4332(2)(C).

NEPA's implementing regulations provide more specific guidance concerning the EIS process. First, an agency must prepare both a DEIS and an FEIS. It must also prepare an SEIS at either stage if, among other things, "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1)(i) (1994). Second, the agency must

> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

> (c) Include reasonable alternative not within the jurisdiction of the lead agency.
>
> (d) Include the alternative of no action.
>
> (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement, and identify such alternatives in the final statement unless another law prohibits the expression of such a preference.
>
> (f) Include appropriate mitigation measures not already included in the proposed action or alternative.

Id. at § 1502.14. Third, the EIS must "succinctly" describe the environment of the affected area and discuss both the direct and indirect environmental effects of the listed alternatives. *Id.* at §§ 1502.15, 1502.16. Finally, the agency must assess, consider and respond in the final EIS to agency and public comments on the DEIS. *Id.* at § 1503.4.

In meeting these obligations, an agency preparing an EIS must employ what the Supreme Court has referred to as a "rule of reason." *See Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 373 (1989) (agency should use rule of reason in deciding whether to issue an SEIS); *see also, Valley Citizens for Safe Env't v. Aldridge,* 886 F.2d 458, 460 (1st Cir. 1989) (EIS must contain a reasonable discussion of alternatives); *Sierra Club v. Marsh,* 976 F.2d 763, 767-68 (1st Cir. 1992) (EIS must discuss only "reasonably foreseeable" impacts). *Norfolk v. United States EPA,* 761 F. Supp. 867, 878 (D. Mass. 1991), *aff'd*

without op. 960 F.2d 143 (1st Cir. 1992) (agency must reasonably respond to public comments). Thus, an EIS need not identify every conceivable alternative or evaluate highly speculative or indefinite potential impacts. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 551 (1978); *Sierra Club,* 976 F.2d at 767-68. Instead, it is sufficient if the EIS contains " 'such information as appears to be reasonably necessary under the circumstances for evaluation of the project.' "*Id.* at 767 (quoting *Britt v. United States Army Corps. of Engineers,* 769 F.2d 84, 91 (2d Cir. 1985)).

A reviewing court may invalidate an EIS only if the agency's actions are " ' "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." ' " *Sierra Club,* 976 F.2d at 769 (quoting *Conservation Law Found. v. Secretary of the Interior,* 864 F.2d 954, 957 (1st Cir. 1989) (in turn quoting 5 U.S.C.A. § 706(2)(A))). This standard is highly deferential because decisions about matters such as whether a change in the proposed action is significant enough to warrant the issuance of an SEIS, whether a particular alternative is reasonable, and whether a potential impact is speculative present "classic example[s] of . . . factual dispute[s] the resolution of which implicate[ ] substantial agency expertise." *Oregon Natural Resources Council,* 490 U.S. at 376; *accord Sierra Club,* 976 F.2d at 769. Thus, the reviewing court's standard of review will be whether "the agency decision in the context of the record, is too 'unreasonable' (given its statutory and factual context) for the law to permit it to stand." *Sierra Club,* 976 F.2d at 769; quoting *Sierra Club v. Marsh,* 769 F.2d 868, 871 (1st Cir. 1985).

With these general principles in mind, I turn to plaintiffs' specific claims.

Appendix C

1. *Duty to present and evaluate alternatives.*

a. Alternative sites.

The Forest Service determined that Loon's purpose in expanding is to "meet the increased demand for the recreational experience traditionally provided at Loon and to plan for projected growth in the number of skier visits to Loon." In determining whether this purpose could be fulfilled by expanding other ski areas, the Forest Service restricted its detailed analysis of alternative to the four other ski areas located in the White Mountain National Forest ("WMNF").[10] Plaintiffs argue that the Forest Service violated NEPA by failing to also consider the possibility of expanding other New England ski areas.

An FEIS's discussion of alternatives "need not extend [to alternatives] beyond those reasonably related to the purposes of the project." *Laguna Greenbelt, Inc. v. United States Dept. of Transp.*, 42 F.3d 517, 524 (9th Cir. 1994). Consistent with the purpose of Loon's proposed expansion, the Forest Service decided not to examine whether the demand for additional skiing could be met through expansion at ski areas in Vermont because Vermont's ski areas drew their skiers primarily from Connecticut and New York, whereas Loon was attempting to satisfy the demand for skiing in the Massachusetts and Southern New Hampshire markets. It did not consider whether the demand could be met by expansion at any of the approximately twenty other New Hampshire ski areas that are not located in the WMNF because those ski areas did not offer the same type of skiing experince as the WMNF ski areas which have more terrain, higher mountains, more natural snow, and better facilities than

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10. These ski areas are Cannon, Waterville, Wildcat, and Attitash.

their counterparts outside the WMNF. While plaintiffs plainly disagree with these conclusions, they have not established that they were arbitrarily made. Therefore, they did not provide a basis for invalidating the FEIS.

b. Alternative snowmaking water sources.

The plaintiffs next contend that the Forest Service unreasonably failed to explore alternatives to using Loon Pond as a water source for snowmaking. Plaintiffs quote excerpts from letters sent to the Forest Service suggesting that it consider requiring Loon to construct a water storage system rather than use Loon Pond. In particular, Dubois suggested during the comment period that Loon install water storage tanks under the planned golf course. The Forest Service did not respond to any suggestions for alternative water storage, but did include a small storage pond as part of the snowmaking system in several of the alternatives it considered.

Alternatives two and three included an artificial pond of about one acre to be constructed near the base of the ski area. The parties agree that the small pond would have mitigated the demand for water from Loon Pond but would not have replaced Loon Pond as the water source for snowmaking. The small pond was not included in alternative six, the Forest Service now explains, because the alternative's trail design did not require sediment impoundment during construction and because there was no natural drainage in the area where the trails were to be located. The Forest Service also explains that it did not consider the construction of underground storage tanks to be a reasonable alternative both because they would have to be too large and because their construction would produce adverse environmental impacts. It also contends that additional ecological stress would

be put on the East Branch if it were used as Loon's sole source for snowmaking water. Based on these concerns, the Forest Service claims that a storage facility alternative would not feasible.

NEPA requires discussion of alternatives that are reasonable and appropriate for the purpose proposed, but does not require consideration of remote, speculative, fanciful, or hypothetical alternatives. *Valley Citizens,* 886 F.2d at 461. The Forest Service considered a small pond in the context of a trail system that made the pond practical, but concluded that constructing a facility to replace Loon Pond was not a feasible alternative both because of size and problems with water collection and use. The plaintiffs have not shown that Dubois or any other commentator offered specifics as to how to implement a suggested alternative water storage system. Finding no evidence that undermines the Forest Service's conclusion on this point, I conclude that the Forest Service did not arbitrarily exclude consideration of water storage facilities.

2. *Duty to describe the environment to be affected and consider potential impacts.*

Plaintiffs argue that the Forest Service failed to gather enough data about Loon Pond to reasonably assess its current condition and the impact of the planned expansion. Specifically, they allege that the Forest Service failed to: (1) evaluate the present condition of populations of open-water plants and animals in Loon Pond; (2) test water from the East Branch and Loon Pond for microscopic organisms and chemical content, including mercury and acidity, by sampling water from each monthly for one year; (3) inventory the plant species in the pond's littoral zone; (4) determine the amount and types of sediments that would be exposed to the air by drawdowns of the

pond; (5) document the pond's "limnological" cycles; and (6) determine to what extent the pond is used by birds and animals. In addressing the plaintiff's argument, I begin by describing the information that the Forest Service did collect relevant to the pond's current condition.

According to the FEIS, Loon Pond is a steep-sided granite bowl with a relatively small ring of shallow area around its perimeter. It has approximately sixteen acres of surface area and a maximum depth of sixty-five feet. It has an eight-foot high concrete dam on one end. The pond has historically been used both as a primary water source for the Town of Lincoln, and as a snowmaking water source for Loon. As a result, its water level fluctuates on average four to six feet per year. In 1989, the pond was drawn down ten and one-half feet.

Water quality samples taken in 1988 showed that the pond's pH levels were low during the spring, but became less acidic after the spring runoff season. A 1951 survey of the pond's vegetation characterized both its emergent and submerged vegetation as "scant" and those conditions were found to have persisted when the pond was again examined in 1988. Qualitative sampling of the pond for invertebrates in 1988 revealed what the FEIS characterized as a "healthy aquatic community." The pond was again observed after the record ten and one-half foot drawdown in 1989 and in 1991. On both occasions, the abundance and position of aquatic plants were found to be similar to conditions observed in 1988. Invertebrates and tadpoles were also found to be abundant in the shallow area near the pond's spillway in 1989. However, because of its low pH, the Forest Service concluded that the pond does not provide a suitable habitat for a self-sustaining fish population.

In arguing that the FEIS does not sufficiently describe Loon

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Pond's current condition, plaintiffs rely heavily on a hypothetical "worst case scenario" for the pond described by a Forest Service scientist, Ron Buso, in a December 1987 letter to Forest Service hydrologist. Buso expressed three primary concerns. First, he stated his belief that a drawdown would destroy all plants and animals in the pond's littoral zone. Second, although his impression was that sediments in the pond's shore area were "course-mineral in character," he stated that if those sediments turned out to be "fine mineral/organic" in nature, the repeated freeze-drying and rewetting of the sediments that would result when the pond was drawn down and refilled could lead to "increases in turbidity (fine silts and clays?), biological oxygen demand (organic ooze?), and dissolved substances (e.g., metals?)." Third, he speculated that a twenty-foot drawdown of the pond could make it more acidic if the pond were refilled with strongly acidic spring runoff. If these concerns turned out to be valid, Buso hypothesized the following worst-case scenario:

> After a 5-10 yr. span of 6-M draw-down and re-fill:
>
> (1) Loon Pond becomes more acidic, remaining below pH 5 year-round;
>
> (2) Metals in sediments (Al, Fe, Zn, Pb) become more abundant in their dissolved forms;
>
> (3) Nutrients released from sediments promote severe algal blooms;
>
> (4) Outflow water becomes murky, discolored, distateful;

> (5) Oxygen demand at depth increase, fisheries potential is lost.

Plaintiffs contend that the Forest Service acted arbitrarily in failing to gather more data concerning the pond's current condition and in failing to address the potential adverse impact Buso describes.

The administrative record does not contain a response to Buso's letter and since the letter was not generated during the public comment period on the DEIS, no response was required.[11] Nevertheless, the Forest Service did respond to several similar concerns expressed by other commentators. One commentator stated that the Forest Service should conduct an invertebrate study of the pond and the Forest Service responded by stating that although its studies had not been exhaustive, they were "completed to a level sufficient to allow a reasoned choice among the alternative in this final EIS." Other commentators expressed concern over the impact on aquatic biology resulting from repeatedly drawing down and refilling the pond. In responding to these comments, the Forest Service relied on its observations of the pond and its aquatic biology in 1988, 1989, and 1991. Based upon these observations, it concluded that the proposed drawdown

> [w]ould affect the same narrow shallow band of area around the pond that previous drawdowns have affected, including the 10.5-foot drawdown in 1989. This relatively simple ecosystem of this shallow band,,

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11. Even if the letter had been generated during the comment period, the Forest Service would not have been obligated to address Buso's speculations in the FEIS since NEPA does not require the evaluation of "worst case scenarios." *Methow Valley,* 490 U.S. at 354-55.

> primarily aquatic plants and aquatic insects, have apparently not been adversely affected by past drawdowns based on their abundance during sampling in 1988 and 1989. Based on this information, it is doubtful this ecosystem would be affected by future drawdowns under this alternative. Shallow littoral areas were not available under present draw-down levels once the pond is frozen and this situation would not change. Somewhat less open water-deep habitat would be available than at present, but it is doubtful this type of habitat would be limiting to the pond's inhabitants.

In short, the Forest service concluded that the pond's aquatic biology and water quality were not likely to be adversely affected by the proposed expansion plan. It based these conclusions on surveys of the pond and its plants and animals before and after the significant drawdown in 1989. While, with the benefit of hindsight, additional studies might have developed additional information about the pond's current condition, the Forest Service's description of the pond is adequate to support its impact analysis.[12]

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12. Dubois also submits affidavits from several scientists, purporting to show that additional testing was required to adequately assess the environmental impact of the project on Loon Pond. These opinions are not part of the administrative record here and were not offered to the Forest Service during the EIS process. Although I could consider extrinsic information such as this in order to clarify the administrative record, I do not find the affidavits helpful for that purpose. *Valley Citizens,* 886 F.2d at 460; *accord Sierra Club,* 976 F.2d at 772-73; *National Audubon Society v. United States Forest Serv.,* 46 F.3d 1437, 1447 (9th Cir. 1994).

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3. *Response to public comments.*

While preparing the FEIS, the Forest Service was obligated to assess and respond to public comments. 40 C.F.R. § 1503.4(a). The required response may be made by modifying the alternatives, developing and evaluating a new alternative, supplementing, improving, or modifying the previous analyses, making factual corrections, or explaining "why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's postition and, if appropriate, indicat[ing] those circumstances which would trigger agency reappraisal or further response." *Id.* The plaintiffs challenge the Forest Service's response to comments on the following topics: (1) dissolved oxygen levels in Loon Pond; (2) Lincoln's ability to meet is water supply needs; (3) cumulative impact of ski area development within the WMNF; (4) impact of traffic on Route 112 east of Loon; (5) mitigation measures for Lincoln's sewage lagoons; (6) impact of parking lot run-off. I address each topic in turn.

a. Dissolved oxygen levels in Loon Pond.

Plaintiffs challenge the Forest Service's response to a concern expressed by the EPA about the potential for depletion of dissolved oxygen in Loon Pond. The EPA raised the issue in a letter dated October 13, 1988, reviewing "the second draft of Chapter 3 and the first draft of Chapter 4 of the U.S. Forest Service's EIS for the proposed Loon Mountain expansion project."

The regulation requiring an agency to solicit comments provides that "[a]fter preparing a draft environmental impact statement and before preparing a final environmental impact

statement" the agency shall obtain comments from any federal agency that has jurisdiction or expertise as to any involved environmental impact and request comments from others. 40 C.F.R. § 1503.1(a) (1994). Agencies with particular expertise are required to comment within the applicable time period. *Id.* at §§ 1503.2, 1506.10. An agency issuing an FEIS is required to attach "[a]ll substantive comments received on the draft statement" even if the agency determines that individual response is not necessary. *Id.* at § 1503.4(b). Since the EPA's statements concerning dissolved oxygen were made prior to the issuance of the DEIS, the Forest Service was not required to formally respond in the FEIS. Further, the EPA's 1988 letter states that "[a]s in the past, these do not necessarily represent our final comments on the document and we will keep you informed of any additional comments we may have." Since the EPA did not express this concern again in its formal comments on the DEIS, the FEIS cannot be faulted for failing to respond directly on the subject.[13]

b. Evaluation of Lincoln's water supply needs.

The plaintiffs contend that the Forest Service violated NEPA by failing to respond to comments about Lincoln's water supply needs that the EPA raised in a January 1993 letter. In essence, the EPA letter expresses a disagreement with the way in which the Forest Service analyzed the town's water needs separately from the effects of the proposed project. Specifically, the EPA letter expressed concern that the Forest Service should not

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13. As I have previously noted, the FEIS does respond to the somewhat more general concerns expressed by others that plant and animal life in the pond would be harmed if Loon and Lincoln were permitted to repeatedly draw the pond down by as much as twenty feet.

"approve a permit that will lead to a worsening of [Lincoln's water supply] situation based on an assumption that a solution to the town's current problems will be found."

First, there is no dispute that the Forest Service addressed the issue of Lincoln's water supply needs during the EIS process. The issue was revisited in the Forest Service's decision to grant the permit. The Forest Service also responded generally to comments on the RDEIS about Lincoln's water system in the FEIS. The 1993 letter was a comment on the FEIS, and consequently could not have been included in the response section of the FEIS.

Once an FEIS is prepared, questions aimed at its sufficiency require consideration of whether a supplement to the FEIS is necessary. 40 C.F.R. § 1502.9(c). A supplement would have been required in this case only if the EPA's 1993 letter showed that the Forest Service had made substantial changes in the proposed action relevant to environmental concerns, or if the letter introduced "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* at § 1502.9(c)(1)(ii). That is not the case here. Thus, the Forest Service's lack of response to the letter was not in violation of its obligations under NEPA and the issues raised in the letter were addressed during the EIS process.

c. Cumulative impacts.

The plaintiffs cite another section of the EPA's 1993 letter in which the EPA disagreed with the Forest Service's conclusion that the potential impacts on water supplies due to the demands of any future expansion at other WMNF ski areas were not

cumulatively significant. Again, the plaintiffs expect a NEPA-induced reply from the Forest Service. As discussed above, because the 1993 letter responded to the FEIS, the relevant question here is whether the Forest Service should have supplemented the FEIS in response to the letter. The letter's comment merely expresses disagreement with the Forest Service's evaluative conclusion, but does not suggest circumstances that would require a supplement. *See* 40 C.F.R. § 1502.9(c). Thus, the Forest Service's silence following the EPA's letter on this issue was not unreasonable.

d. Traffic on Route 112.

In a comment letter to the Forest Service, Dubois noted that the RDEIS predicted that the expected traffic would strain Route 112 and that consideration of expanding the "traffic carrying capacity" of the highway was underway. He then commented:

> The RDEIS fails to adequately assess the likely impact of the Loon Mountain development alternatives on this highway. Information on the likelihood that Loon development will require expansion of Highway 112 should be made *now* before the project is approved.

The Forest Service responded:

> There are several options provided in Volume I pages 220-222 for safe access to and from Loon Mountain. None of them would involve altering Highway 112 between Conway, NH

> and the Loon Mountain access road. Those options include widening and improving ramps on and off Interstate 93, construction of the South Mountain access road, and providing additional traffic turning lanes at the intersection of Highway 112 and Loon Mountain Road.

Plaintiffs now contend that the Forest Service's response was inadequate because it failed to address the potential for traffic congestion on Route 112 east of Loon. If Dubois' comment was intended to raise a question about the adequacy of traffic studies for the eastern portion of Route 112, he missed his mark. His comment refers to the existing traffic studies in the RDEIS and expresses concern that the highway would be expanded to accommodate the traffic discussed there. The Forest Service reasonably interpreted his comment to ask for clarification of the expansion plans for Route 112 and responded accordingly. No more was required.

e. Mitigation measures for Lincoln's sewage lagoons.

Dubois suggested two mitigation measures for the problem of leaking sewage lagoons in Lincoln's wastewater treatment system: require Loon to install synthetic liners in the lagoons to prevent leakage; or require certification from the EPA, as well as the state, that the lagoons are operating properly before allowing construction to begin. The Forest Service discussed Lincoln's wastewater treatment system and the problem of leaking sewage lagoons in the FEIS. It responded to comments about the leaking lagoons explaining that the alternatives under consideration provided that "the proposed ski area construction would not begin prior to construction of the water treatment

plant and operation of the sewage system in accord with state law." The Forest Service also addressed the issue of whether the state should be responsible for determining the acceptable level of operation of the wastewater treatment system. In the ROD, the Forest Service conditioned beginning construction in the expansion area on "Lincoln's sewage system operating in conformance with State requirements." Although the Forest Service never specifically answered Dubois' suggestion that Loon install liners, it preempted the need for requiring specific mitigation measures by imposing a general requirement that the system must comply with all applicable state laws. I do not find that the Forest Service's failure to respond to Dubois' suggestion of requiring liners was unreasonable.

f. Runoff from new parking areas.

The plaintiffs point to Dubois' comment concerning the effect of runoff from the planned new parking area relative to increasing the summer water temperatures in the East Branch and adding heavy metal contaminants. He proposed that loon be required to mitigate these effects by collecting and treating all runoff water. The plaintiffs argue that the Forest Service failed to respond to Dubois' comment.

The Forest Service reported in the FEIS that "[c]ertain heavy metals such as lead, zinc, copper, chromium, nickel, and mercury are commonly found in urban runoff from parking lots and roads" and that those contaminants would be likely to occur due to the proposed development. In addition, the Forest Service conceded that "[t]hese non-point sources would result in the degradation of water quality if allowed to enter the stream, which could violate the state's antidegradation standards." In response, the Forest Service referred to its planned mitigation measures including "buffer strips to ensure natural infiltration and filtering

before runoff reaches the river." In the ROD, the Forest Service noted concerns about contamination of the East Branch caused by runoff and other aspects of the expansion but concluded that the requirements of the Alteration of Terrain Permits would prevent any significant impact.

Because the Forest Service both considered the concerns raised by Dubois and addressed mitigation measures for the potential impacts of parking lot runoff, the Forest Service's failure to discuss his specific proposal was not unreasonable.

4. *Requirements of Executive Order 11,990.*

The parties agree the FEIS must comply with the dictates of an executive order to satisfy NEPA requirements. *See City of Waltham v. United States Postal Service,* 786 F. Supp. 105, 132 (D.Mass. 1992), *aff'd,* 11 F.3d 235 (1st Cir. 1993). They disagree, however, as to whether the Forest Service adequately addressed the obligations imposed by Executive Order 11,990. Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (1977), *reprinted as amended in* 42 U.S.C.A. § 432 (West 1994). Executive Order 11,990 requires federal agency leadership and action to minimize destructive effects and "to preserve and enhance the natural and beneficial values of wetlands" when engaged in particular activities affecting land use. Exec. Or. No. 11,990 § 1(a). Specifically, the Executive Order directs that

> each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to

> minimize harm to wetlands which may result from such use.

Ex. Or. No. 11,990 § 2(a). practicable, in this context, means "capable of attainment within relevant, existing constraints." *National Wildlife Federation v. Adams,* 629 F.2d 587, 591-92 (9th Cir. 1980); *accord County of Bergen v. Dole,* 620 F. Supp. 1009, 1061 (D.C.N.J. 1985), *aff'd without op.,* 800 F.2d 1130 (3d Cir. 1986). These requirements serve to focus agency attention on protecting wetland areas during the EIS process. *See N. ·nal Wildlife Fed'n,* 629 F.2d at 591; *Conservation Law Found. v. Department of the Air Force,* 864 F. Supp. 265, 289 (D.N.H. 1994). The Executive Order does not prohibit action without an appropriate finding, but directs that such actions are to be *avoided. National Wildlife Fed'n,* 629 F.2d at 591.

The plaintiffs assert that the Forest Service failed to find that no practicable alternative to the use of Loon Pond existed and that all practicable measures to minimize harm to Loon Pond has been developed, and failed to consider appropriate factors for evaluating measures for minimizing harm. In its decision, the Forest Service stated that it had considered the Executive Order but did not make specific findings under those requirements.

To properly set the scope of practicable alternatives, it is important to remember that Loon is presently using water from Loon Pond for snowmaking under its existing permit and Lincoln uses the pond as a primary municipal water source.[14] The Forest

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14. Under a present agreement between Lincoln and Loon, Loon can drawdown the top eighteen inches of the pond for snowmaking and may take more as decided on a case by case basis. Currently, Lincoln uses Loon Pond

(Cont'd)

Appendix C

Service considered but rejected a suggested alternative of no snowmaking because "snowmaking has become a necessity in eastern skiing to assure a reasonable opening date and to provide skiing during low natural snow years." Thus, the relevant question is whether the Forest Service considered the existence of practicable alternatives and mitigation measures for the *increased* use of Loon Pond to meet expected snowmaking needs.[15]

The Forest Service considered the water quantities needed for snowmaking in six alternative plans ranging from no action to full expansion onto South Mountain. From those alternatives, it chose alternative six, providing for limited expansion and water withdrawal. The Forest Service concluded that snowmaking was a necessary component of skiing at Loon and that using Loon Pond as the water source with limitations on withdrawals was the best alternative.

Plaintiffs again raise the alternative of using water storage tanks. They argue in this context that the Forest Service failed to meet the requirements of the Executive Order because it made no finding that water storage tanks or artificial ponds were not practicable alternatives or mitigation measures. In the process of choosing alternative six, the Forest Service considered alternatives that included constructing a small pond. As

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(Cont'd)

as a primary municipal water source, but is planning a water treatment system to use the East Branch as the primary water source and rely on the pond only for emergency needs.

15. I will assume, without deciding, that authorizing an increased use of the pond would fall within the definition of "new construction" as used in the Executive Order.

explained in a previous section, the Forest Service did not consider construction of storage tanks to be a practicable solution and found that the artificial ponds were not useful in the trail configuration chosen in alternative six. I conclude that a specific finding to that effect is unnecessary as the reasons behind the Forest Service's decision meet the Executive Order standard. In summary, the Forest Service's conclusion that it had considered the requirements of Executive Order 11,990 was not arbitrary, despite the lack of specific findings, because the necessary considerations were included in the EIS process.

5. *Is a supplement required*?

NEPA contemplates significant public involvement in the information gathering process to produce an EIS. 42 U.S.C.A. § 4332(2)(C); 40 C.F.R. Parts 1502 & 1503; *Methow Valley Citizens*, 490 U.S. at 349. Part of the process requires that EIS documents be made available for public comment. *Massachusetts v. Watt*, 716 F.2d 946, 951 (1st Cir. 1983). Public comment is elicited only in response to a DEIS, "[c]onsequently, an agency's failure to disclose a proposed action before the issuance of a final EIS defeats NEPA's goal of encouraging public participation in the development of information *during* the decision making process." *Half Moon Bay Fishermans' Marketing Assoc. v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). To insure that the EIS process will come to an end, however, agencies must produce a supplement only if:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances

> or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c)(1); *see also Oregon Natural Resources Council*, 490 U.S. at 373.

The plaintiffs argue that the Forest Service was required to supplement the RDEIS and allow public comment on alternative six before it was selected. Also, the plaintiffs contend that the Forest Service must now issue a supplement to the FEIS because the pumping system described in alternative six has been replaced with a different plan that will have significant environmental effects. I address each issue in turn.

a. Opportunity to comment.

Instead a supplementing the RDEIS, the Forest Service issued an FEIS that incorporated changes made in response to comments on the RDEIS. It introduced and explained a new preferred alternative comparing it to the five previously considered alternatives. The Forest Service described alternative six as a composite of several of the other alternatives with a few changes made in response to public comment. The Forest Service represented that the changes made in alternative six, which were not previously considered in any of the other alternatives, did not present new environmental effects. The plaintiffs point to several differences between alternative six and the previously considered alternatives, but they do not show that any of the changes were substantial or relevant to environmental concerns.

Plaintiff RESTORE also argues that a supplement is necessary in response to the Forest Service's new ecological approach under its New Perspectives program in managing the

National Forests. RESTORE did not explain why the New Perspectives program constituted "new information [that] is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered." *Oregon Natural Resources Council,* 490 U.S. at 374 (footnote and citation omitted).

First, according to RESTORE, the New Perspectives program has been well known within the Forest Service since 1989. Second, beyond providing its own opinion, RESTORE did not demonstrate that the Forest Service failed to follow the New Perspectives program or that a consideration of "ecosystem management" under New Perspectives would make a significant impact in the context of the Loon expansion project.

The Forest Service's decision to present alternative six in the FEIS, rather than in a supplement to the RDEIS, is based on its expertise in analyzing information relevant to the various alternatives and comments. Thus, I defer to the Forest Service's "informed discretion" that the FEIS was sufficient to provide the necessary information for an informed decision to choose alternative six and conclude that its decision was neither arbitrary nor capricious. *Oregon Natural Resources Council,* 490 U.S. at 377.

b. Change in the plan since the ROD.

In the ROD, the Forest Service described the approved snowmaking and water pumping system as follows:

> Features of the snowmaking system include:
> 1) Water from Loon Pond would continue to be pumped from the current location and the

present pumping equipment would be upgraded, providing water for snowmaking, rather than drilling through the side of the pond as proposed for other alternatives; 2) the up-mountain valving station and associated piping system would be expanded to handle the increased pumping; and 3) no snowmaking pond would be constructed in the Lift G area.

Loon would maintain a minimum flow in Loon Pond Brook for Lincoln's water system either through the existing dam system when the pond is sufficiently full, or through the pumping system when the pond is low.

Limitations on water use for this alternative include: a 15-foot maximum drawdown of Loon Pond for snowmaking; a 5-foot reserve for a total drawdown of 20 feet for the Town of Lincoln; no withdrawals from the East Branch Pemigewasset River at flows less than 85 cfs.

The parties agree that the plan for pumping water from Loon Pond has been changed from that described in the ROD. As described by the parties with supporting materials, the current plan calls for a new pumphouse at a new site on the pond and construction of a new water withdrawal system at the edge of the pond. Construction of the new facilities would require blasting, dredging, and filling an area of the pond.

Neither Loon nor Lincoln can begin construction of the new water pumping system without Forest Service approval. In July

of this year, the Forest Service rescinded its approval of the new pumphouse and water withdrawal site, and has not yet decided what action it may take in response to the requested change. At this juncture, no Forest Service action on this issue exists for review. Therefore, the plaintiffs' argument to require the Forest Service to supplement to RDEIS is premature.[16]

III. CONCLUSION

The Forest Service's motion for summary judgment (document no. 31) is granted. Loon's motion to dismiss (document no. 26) and plaintiffs' motions for summary judgment (document nos. 46, 54 and 56) are denied.

SO ORDERED.

s/ Paul Barbadoro
Paul Barbadoro
United States District Judge

November 2, 1995
cc: Roland Dubois
Jed Callen, Esq.
Melanie A. Williams, Esq.
Joel D. Armstrong, Esq.
T. David Plourde, Esq.
Sylvia Quast, Esq.
Cindy Hill, Esq.
Scott E. Hogan, Esq.
James L. Kruse, Esq.

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16. Plaintiffs also raise several less significant arguments in opposing defendant's summary judgment motion. I reject these arguments without further discussion because I determine that they plainly lack merit.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 95-50-B

Roland C. Dubois, et al

v.

U.S. Department of Agriculture, et al

JUDGMENT

In accordance with the Memorandum and Order dated November 2, 2995 by Judge Paul Barbadoro, judgment is hereby entered.

By the Court,

s/ illegible
Clerk

November 3, 1995

cc: Roland Dubois
Jed Callen, Esq.
Melanie A. Williams, Esq.
Joel D. Armstrong, Esq.
T. David Plourde, Esq.
Sylvia Quast, Esq.
Cindy Hill, Esq.
Scott E. Hogan, Esq.
James L. Kruse, Esq.

APPENDIX D — RELEVANT STATUTES AND REGULATIONS

STATUTES INVOLVED

(i) The Clean Water Act, 33 U.S.C. § 1251 *et seq.*

33 U.S.C. § 1311(a) provides that:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1342(a)(1) provides that:

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311 (a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1362(6) provides in pertinent part that:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage,

> garbage, sewer sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(7) provides that:

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(12) provides in pertinent part that:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means . . . any addition of any pollutant to navigable waters from any point source. . . .

33 U.S.C. § 1365(14) provides in pertinent part that:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

Appendix D

(ii) The National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* ("NEPA") 42 U.S.C. 4332(2)(c) provides in pertinent part that:

> all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

APPENDIX E — REGULATIONS INVOLVED

40 C.F.R. § 1502.1 provides in pertinent part that:

> The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.

40 C.F.R. § 1502.9 provides in pertinent part that:

> (b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.
>
> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.14 provides that:

> This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:
>
> (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
>
> (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.16 provides in pertinent part that:

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal

should it be implemented. This section should not duplicate discussions in §1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

* * *

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

Appendix E

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).